Supreme Court,

OF THE UNITED STATES.

In the matter of the petition of Erwin Davis for a writ of certiorari, &c., in the cases of

ERWIN DAVIS,

Plaintiff in Error,

against

ANGELICA WAKELEE,

Defendant in Error,

ERWIN DAVIS,

Plaintiff in Error,

against

PIERRE B. CORNWELL,

Defendant in Error.

BRIEF FOR PETITIONER.

Point I.

The Circuit Court of Appeals was in error in holding that the opinion of this Court on the appeals in equity

was controlling, and was in error in not holding that the opinion of this Court necessarily led to a reversal of said judgments.

In the petition we have quoted from the opinion of this Court on the equity appeals.

On those appeals this Court had before it one question, whether or not Mr. Davis could now assert that the judgments in California were void for want of jurisdiction. After fully examining the facts this Court was of the opinion that Mr. Davis, in asserting that the judgments were of record and in full force, was asserting a fact, an essential and important fact, and that, therefore, he could not now take the inconsistent position that as a matter of fact there never were any such judgments.

It is, however, respectfully submitted that this Court, in its opinion, clearly drew the line of distinction, between assertions of fact and assertions of law.

This Court speaks of Mr. Davis's motion to dismiss as being upon the ground that the judgment was in full force, but when it speaks of the statement that the judgment would not be discharged, this Court speaks of such an assertion as *argument*. This was done "argumentatively." This Court says that Davis asserted that "under the law" the judgment would be unaffected by a discharge.

This Court says: "But even if Davis had been mistaken as to his *legal* rights with respect to this judgment and its subsequent discharge, his assertion that it was *still of record and in full force is none the less binding upon him.*"

Nothing is clearer than this, that the former kind of an assertion is one which is not binding upon him.

As authority for this proposition we refer to the opinion of the Supreme Court itself, and the fol-

lowing cases holding that the assertion of a legal conclusion is not binding.

Union Bank *v.* Bush, 36 N. Y., 631;
Bigelow on Estoppel, 5th edition, page 572;
Chatfield *v.* Simonson, 92 N. Y., 218;
Jones *v.* The Phœnix Bank, 8 N. Y., 228.

The court in bankruptcy had no jurisdiction to adjudicate as to what would be the effect of a future discharge in bankruptcy. They had no jurisdiction over the subject matter.

So expressly held by Judge Blatchford *in re* Rosenberg, 2 N. B. R., 236, by Judge Hoffman, the same Judge who made the order in the present cases.

See *in re* Ghiradelli, 1 N. B. R., 164.

Thus the assertion of a matter concerning which the Court had no jurisdiction would be immaterial. Facts alone must be in issue.

Reynolds *v.* Stockton, 140 U. S., 254;
Bryant *v.* Thompson, 128 N. Y., 433.

Courts cannot anticipate questions.

Elling *v.* Bank of the United States, 11 Wheat., 73;
Boyd *v.* Alabama, 94 U. S., 648;
Stryker *v.* Goodnow, 123 U. S., 538;
Jackson *v.* Turnley, 21 Eng. Law and Equity Reports, 13.

The cases cited in the opinion of this Court in the equity appeals with respect to change of position when examined are all cases in which the change of position was with respect to some existing fact or matter.

In the present cases the assertion, if made, was with respect to what would be in the future the legal effect of a non-existent discharge. The distinction is manifest.

Point II.

The Circuit Court of Appeals was in error in failing to give effect to the discharge in bankruptcy, and in that respect is at variance with many well-considered decisions of this Court.

The United States Revised Statutes provide that a discharge is conclusive as to all debts which were, or might have been, proved (Section 5119), and the only exceptions whereby it can be impeached are when the proof is made that the *debt* was created by fraud, &c., or by defalcation as a public officer, or while acting in a fiduciary capacity, &c. (Sections 5117, 5118).

None of these exceptions were proved in the present cases, and the discharge, was, therefore, conclusive. If Congress had intended that the discharge could be impeached *because of representations, or because of the taking of an inconsistent position*, it would have said so. Not having so provided, courts have no authority to go outside of the statute. Where none of the legal exceptions are proved, the discharge is conclusive.

Neal *v.* Clark, 95 U. S., 704;
Wolf *v.* Stix, 99 U. S., 1;
Hennequin *v.* Clews, 111 U. S., 676, 682; see, also, 77 N. Y., 427;
McDonald *v.* Davis, 105 N. Y., 508;
Palmer *v.* Hussey, 119 U. S., 96;

Noble *v.* Hammond, 129 U. S., 65;
Upshur *v.* Briscoe, 138 U. S., 365;
Ames *v.* Moir, 138 U. S., 306;
Stanton *v.* Ellis, 12 N. Y., 575;
Palmer *v.* Hussey, 87 N. Y., 303;
Talcott *v.* Harris, 93 N. Y., 567;
Stratford *v.* Jones, 97 N. Y., 586;
West Philadelphia *v.* Gerry, 106 N. Y., 472;
Lester *v.* Thompson, 1 Johns., 300;
Rich *v.* Salinger, 11 Abb. Pr., 344;
Stuart *v.* Salinger, 14 Abb. Pr., 291 to 297;
Dresser *v.* Shufeldt, 7 How. Pr., 85;
Jackson *v.* Robinson, 4 Wend., 436.

The fact that the original claims have been reduced to judgment does not merge them in the judgments. The judgment are not a new debt, and are discharged.

Clark *v.* Rowiing, 3. N. Y., 216;
Monroe *v.* Upton, 50 *id.*, 598;
Dresser *v.* Brooks, 3 Barb., 429;
In re Brown, 3 Nat. B'k Reg., 145;
In re Stansfield, 16 *id.*, 268;
Fox *v.* Woodruff, 9 Barb, 498;
In re Van Buren, 19 Nat. B'k Reg., 149, 150;
In re Stevens, 4 *id.*, 122;
In re Vickery, 3 *id.*, 171;
In re Crawford, *id.*, 171;
In re Rosey, 8 *id.*, 507;
Arnold *v.* Oliver, 64 How. Pr., 452;
Boynton *v.* Ball, 121 U. S., 457.

No facts have been proved in these cases which take the plaintiff's claims out of the operation of the general rule.

Palmer *v.* Hussey, 87 N. Y., 303, 310;
In re Stansfield, 16 Nat. B'k Reg., 268;

The World Co. *v.* Brooks, 3 *id.*, 588;
In re Rosenberg, 2 Nat. B'k Reg., 236;
Dingee *v.* Becker, 9 Pa., 196;
Bump on Bank'cy, 10th ed., 273;
In re Belden, 6 Nat. B'k Reg., 443;
In re Rosenberg, 2 *id.*, 236, 240;
In re Ghiradelli, 4 *id.*, 164.

The discharge itself is conclusive (Sec. 5119).

All papers and proceedings in the bankruptcy court are merged in, and superseded by, the discharge, and should stand on the same footing, when offered in evidence, as writings and parol proof offered to show the grounds of the judgments. Such proof is admissible only where a judgment is silent or ambiguous, but is never permitted to explain away or contradict its express terms.

Wood *v.* Jackson, 8 Wend., 1;
Kerr *v.* Hays, 35 N. Y., 331;
Young *v.* Rummell, 2 Hill, 478;
Stedman *v.* Patchin, 34 Barb., 218;
Blumenthal *v.* Anderson, 91 N. Y., 171.

The discharge in bankruptcy of Mr. Davis is the judgment of a court, and stands upon the footing of other judgments; can in no way be impeached with respect to what appears upon its face; that is, it is conclusive of the discharge of these judgments, because none of the exceptions shown in Sec. 5117 have been raised or proved.

It is a judgment of a court unambiguous upon its face, and cannot be impeached.

Stevens *v.* Brown, 11 B'k Reg. (Miss. Sup.), 568, 572;
Lathrop *v.* Stewart, 5 McLean, 167;
Ocean Nat. B'k *v.* Olcott, 46 N. Y., 12, 15;
Smith *v.* Nelson, 62 *id.*, 286, 288;
Blumenstiel on Bky., 554;
Bump on Bky., 749;
Monroe *v.* Upton, 50 N. Y., 593.

In a similar litigation the highest court of New York held that Mr. Davis's discharge was an absolute bar.

See McDonald *v.* Davis, 105 N. Y., 508.

Point III.

The Circuit Court of Appeals was further in error in holding that the ground of Mr. Davis's motion to dismiss was that the judgment would not be discharged.

As we have shown in the petition herein, the motion was not only made on Mr. Davis's petition in the bankruptcy court, but on all the record of the bankruptcy proceedings. It is incumbent upon the defendant in error to show that the *sole* ground of the motion was such an assertion. Defendant in error did not meet this burden of proof; on the contrary, it appeared that the motion might have been granted wholly independent of any such alleged assertion.

(*a*). An examination of the specifications shows that they were so indefinite as not to constitute any opposition whatsoever. The motion was made upon the record. Hence upon the specifications also, and, as they were improperly drawn, the order was proper upon this ground alone.

The rule was that specifications of opposition must be as precise as an indictment (Re Butterfield, 5 Biss., 120). They were always dismissed or disregarded if too vague (Re Hill, 2 Ben., 136; Re Rathbon, id., 138; Re Son, id., 153; Re Mawson, id., 332; Re McIntire, id., 345. See also Re Mars-

ton, 5 Ben., 313; Re Freeman, 4 Ben., 245; Re Burk, Deady, 425; Re Waggoner, 1 Ben., 532; 3 Bky. Reg., 27).

(*b*). At the time of the motion in California, the weight of authority was that such judgments would not be discharged, and it was the law that if a creditor desired to oppose, he must first yield his rights acquired outside of the bankruptcy court. The ground of the motion, as was testified to (page 105), was because Mr. Wakelee refused to give up his rights outside of the bankruptcy court, and the motion was made under the authority of Judge Lowell's opinion. (5 Bank, Reg., page 353, the case of Gallison).

It appeared, on the argument of the motion, that Wakelee held on to his attachments and judgment, and therefore the Court, as the law then stood, could properly have dismissed the opposition for the sole reason that Wakelee had voluntarily yielded his rights in the bankruptcy court and deliberately elected to pursue his remedy in the State courts. Upon such a theory the judge would have no need of considering any assertion as to what would be the effect of a discharge.

Not only then was Judge Hoffman justified in dismissing the opposition for this reason, but we submit now that Wakelee, having elected to take the course he did, cannot now insist that he did not so elect, but was influenced by representations in the bankruptcy proceedings to his detriment.

Wakelee cannot now change his ground. See cases cited in the opinion of this Court.

There are innumerable decisions holding that if one determines his election it shall be determined forever.

See Fowler *v.* The Bowery Savings Bank, 113 N. Y., 450;
Cobb *v.* Knapp, 71 N. Y., 348;
Bank of Beloit, *v.* Beal, 32 N. Y., 476;

Riley *v.* The Albany Savings Bank, 36 Hun, 513; affirmed in 103 N. Y., 669;
Moller *v.* Tusca, 87 N. Y., 166;
Andrews *v.* The Life Insurance Company, 92 N. Y., 596.

Point IV.

The California creditors were not influenced by any representations Davis may have made, and any acquiescence was an acquiescence with full knowledge of the risk he took.

The record shows that the creditors' attorneys thought Judge Hoffman was wrong, felt sure that the judgments would be discharged, but they were perfectly satisfied with the dismissal, because they hoped to be able to collect the judgment.

The law was then doubtful as to the effect of a discharge. They, however, believed that sometime this Court would declare the rule to be that such a judgment was discharged. Before this happened, they hoped to collect their judgment.

Otherwise their conduct cannot be accounted for. They had a right to appeal (United States Revised Statutes, 4980 to 4986). If their appeal was unsuccessful this Court would have reinstated them, inasmuch as the matter was not appealable to this Court, and the court below refused to take jurisdiction.

Insurance Co *v.* Comstock, 16 Wall., 258;
Ex Parte Hohorst, 150 U. S., 633.

They were aware of these rights, but the reason for failing to appeal is clear. Had they been rein-

stated on appeal or by mandamus from this Court, it could only have been because they had a right to oppose, and if such was the case, a discharge would bar the judgment. They did not wish to be reinstated and take the risk of failing to prevent a discharge, for, if a discharge was granted, the very opinion which reinstated them would hold that their judgment would be barred by the discharge, and after all such litigation they would only share in a deficiency of assets and would have no judgment remaining. They preferred to try and collect the judgment, although they knew that it ought to be discharged, and although they knew that if they chose, they could be reinstated as creditors to oppose.

We submit, therefore, any acquiescence or failure to appeal was with full knowledge of their rights and was in no way caused by Mr. Davis's assertions or by any position which Mr. Davis took in that litigation.

Point V.

The petition should be granted.

Respectfully submitted.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel.

Supreme Court U. S.
OCT 15 1895
CLERK

Supreme Court of the United States.

163 U.S. 568

In the Matter of the Petition of

ERWIN DAVIS

For a Writ of Certiorari, &c., to the

U. S. Circuit Court of Appeals for the Second Circuit.

PETITION & NOTICE OF MOTION.

LOGAN, CLARK & DEMOND,
Attorneys for Petitioners,
58 William Street,
New York.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel.

Supreme Court

OF THE UNITED STATES.

In the matter of the petition of Erwin Davis for a writ of certiorari, &c., in the cases of

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ERWIN DAVIS,

Plaintiff in Error,

against

ANGELICA WAKELEE,

Defendant in Error.

ERWIN DAVIS,

Plaintiff in Error,

against

PIERRE B. CORNWALL,

Defendant in Error.

Sir:

Take notice, that upon the annexed petition and upon a brief, copies of which are herewith served upon you, and upon the record in the above-entitled cases in the Circuit Court of Appeals, for

the Second Circuit, we shall move the Supreme Court of the United States, at a Term thereof to be held at Washington, D. C., at the Capitol in said city, on the 15th day of October, 1895, at the opening of Court, or as soon thereafter as counsel can be heard, for a writ of certiorari, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the above-entitled causes, and that at said time we shall move for such other or further relief in the premises as may be just and equitable.

Yours, &c.,

WALTEB S. LOGAN,
58 William Street,
New York City,
Counsel for Petitioner, Erwin Davis.

To

ANSON MALTBY. Esq.,
Attorney for Defendants in Error,
Wakelee and Cornwall,
48 Wall Street,
New York City.

To the Supreme Court of the United States of America:

The petition of Erwin Davis for a writ of certiorari, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the cases of

ERWIN DAVIS,
Plaintiff in Error,
against
ANGELICA WAKELEE,
Defendant in Error.

ERWIN DAVIS,
Plaintiff in Error,
against
PIERRE B. CORNWALL,
Defendant in Error.

The said petitioner respectfully shows to this Court as follows:

I.—Your petitioner applies for a writ of certiorari in both of said cases. The facts in both are similar and the facts only in respect to the first of said cases will be given in this petition.

II.—Angelica Wakelee, a citizen of California, brought a suit at law against Erwin Davis in the Circuit Court for the Southern District of New York, Mr. Davis being a citizen of New York.

III.—The action was upon a judgment recovered in a California State Court in 1873 (fol. 136).

IV.—Although this judgment was discharged by Mr. Davis's discharge in bankruptcy in March, 1877 (fol. 70), recovery was claimed on the judgment because of the existence of the following facts:

Davis, in 1869, gave various notes to Angelica Wakelee's predecessor, Henry P. Wakelee (fols. 44 to 50). In September, 1869, Mr. Davis was adjudicated a bankrupt (fol. 153). Subsequently, in 1869 and 1870, Mr. Wakelee proved his claim on these notes in the bankruptcy proceedings in California (fols. 227, 175). In 1873 Mr. Wakelee petitioned for leave to sue at law on these notes, the grounds being that there were no assets in the bankruptcy proceedings (pages 73 to 81, fols. 228 to 232). Leave to sue was granted in 1873 (fol. 273) and the said judgment was recovered in California pursuant to this leave November 18, 1873 (fol. 136).

In December, 1875, Mr. Davis petitioned to be discharged in bankruptcy (fol. 177). Thereupon Mr. Wakelee filed, in February, 1876, specifications of opposition so indefinite as not to constitute any cause of action or opposition (pages 82 to 85).

V.—The important consideration in this litigation now surrounds Mr. Davis's motion to dismiss these specifications of opposition.

In March, 1876, Mr. Davis moved to dismiss these specifications of opposition (page 85). The petition therefor is seen at pages 86 and 87.

The motion was made upon the said petition, and "*upon the files, records, papers and proceedings*" in the bankruptcy proceedings (page 85).

The petition simply alleged that Mr. Wakelee had recovered the said judgment after Mr. Davis's adjudication as a bankrupt, and closed with the words that "said judgment still stands of record * * * and is in full force" (pages 86 and 87).

The motion was argued, the facts were conceded, and by stipulation it appeared that at the time of the motion Mr. Wakelee had attached Mr. Davis's property in other jurisdictions, and that such actions were still pending, and that he filed his opposition without canceling these foreign proceedings (fols. 174 to 179).

The judge granted this motion and dismissed these specifications without any opinion and by order of October 31, 1876 (pages 88 and 89).

VI.—The Circuit Court directed a verdict for Angelica Wakelee on these facts, holding that in effect Mr. Davis had asserted in California that the judgment would not be discharged by a discharge in bankruptcy, and that therefore the discharge when granted had no effect.

VII.—The Circuit Court of Appeals, in its opinion, held:

(*a*). That, *considering the petition* of Mr. Davis on the motion to dismiss these specifications, it appeared that the sole ground of the motion was that the judgment would not be discharged by a discharge in bankruptcy, and hence Mr. Davis, having so asserted, could not now contend to the contrary.

(*b*). The Circuit Court of Appeals also held that this being true, the decision of this Court, rendered March 11, 1895, in the equity appeals brought by Davis against the said Wakelee and Cornwall, was controlling on the Circuit Court of Appeals, and necessitated an affirmance of the judgments below.

VIII.—Your petitioner respectfully submits that in both of these particulars the Circuit Court of Appeals was in error.

(*a*). The petition was only *one* of the papers upon which the motion was made. The other papers were the files, records, papers and proceedings in the bankruptcy proceedings (fol. 255), and considering these other papers, it is clear that the motion was or might have been granted for entirely different reasons.

(*b*). The said decision of this court in the equity appeals not only was not controlling upon the Circuit Court of Appeals, but, when properly construed, inevitably determined that the judgments of the Circuit Court should have been reversed.

IX.—Your petitioner avers that the grounds of said motion to dismiss the specifications of opposition were sufficiently broad to allow a dismissal entirely independent of any claim that the judgment would not be discharged.

(*a*). The motion being made upon the record in the bankruptcy proceedings included, of course, the specifications of opposition (page 82). These were so indefinite that they presented no cause of action or of opposition, and for this reason alone the bankruptcy court should have dismissed them and no one can now say that this was not the reason. Hence, no assertion with respect to the judgment could have influenced the bankruptcy court.

(*b*). The motion having been made on the record included likewise the petition for leave to sue (page 74); the order granting leave to sue (fol. 243); and by the stipulation of facts it appeared (page 58) that pursuant to this leave judgment had been recovered and enforced in various jurisdictions by attachment and in other ways.

As the law then stood it was necessary if a creditor desired to oppose in bankruptcy proceedings for him to yield his rights in the State courts provided

a discharge was granted. Wakelee did not do this, and, therefore, this was an abandonment of his rights in the bankruptcy court as the law then stood, and an election on Wakelee's part to abandon these rights in the bankruptcy court and to stand by whatever rights he had in the State courts. The bankruptcy court then had no option but to dismiss the specifications.

This the Court had a right to do, and it should have done, irrespective of any assertions as to whether or not the judgment would be discharged.

X.—Your petitioner avers, therefore, that inasmuch as the record did not show that the Judge, in dismissing the opposition, acted on the theory that the judgment would not be discharged, and inasmuch as it did affirmatively appear on the record that the specifications were indefinite and that Wakelee had elected his remedy to stay out of the bankruptcy court, it was error to hold that the grounds of the motion were solely upon the claim that the judgment would not be discharged.

XI.—Furthermore, the Circuit Court of Appeals, your petitioner avers, was in error in holding that the opinion of this Court in the equity suits rendered March 11, 1895, was controlling.

(*a*). Attached to this petition are printed the said opinion of this Court, and also the opinion of Mr. Justice Wallace in the Circuit Court of Appeals.

(*b*). In said equity appeals to this court, it appeared that said judgment in California was recovered without jurisdiction and was void. It appeared, however, that in said petition to dismiss said opposition at the end thereof (fol. 259), Davis had asserted that said judgment stood of record and was in full force. The opinion of this Court, considering this assertion, held that it was such an

assertion of an essential *fact*, such a taking of a position with respect to a *fact*, that in said equity suits Mr. Davis could not claim that the said judgment was not in full force and, therefore, Mr. Davis should be enjoined from pleading its invalidity.

(*c*). In the present writs of error, as has been shown, the dismissal of the opposition could have been made because the specifications were indefinite or because Wakelee had elected to stay out of the bankruptcy court, and the petitioner submits there is no fact in the record to show that the ground of the motion was *exclusively* that the judgment would not be discharged. If it be assumed, however, that such an assertion was made, it was at most the assertion of a doubtful conclusion of law with respect to the effect of a discharge in bankruptcy not then in existence, and was not such an assertion or such a taking of a position in court as cannot now be controverted. It was not the assertion of a *fact*, but of a doubtful conclusion of law.

(*d*). That, under such circumstances, Mr. Davis is not prevented from claiming the full effect of his discharge appears clearly in the decision of this Court on the equity appeals.

In the course of its opinion the Supreme Court stated as follows:

1. "Davis moved to dismiss upon the ground that Wakelee had reduced his claim to judgment since the commencement of the bankruptcy proceedings; that said judgment was in full force, and, (argumentatively,) would be unaffected by his discharge."

2. "Davis procured his dismissal of Wakelee's specifications of opposition to his discharge upon the ground that he had a valid judgment against him which was still in full force, and, *under the law*, would be unaffected by his discharge."

3. "That, even if Davis had been mistaken as to his *legal* rights with respect to this judgment and its subsequent discharge, his assertion that it was *still of record and in full force* is none the less binding upon him."

XII.—This Court clearly pointed out, in its opinion, the distinctions between representing, as a *fact*, that the judgment was in existence and representing, *argumentatively*, what would happen in the future. One representation of fact would be binding; the other representation of law could not be binding.

XIII.—Your petitioner further shows that Mr. Wakelee, assuming Mr. Davis represented as claimed, placed no reliance on this representation. Mr. Wakelee's counsel didn't think the decision was right; they were satisfied with it, however, although they had an idea that the discharge would bar the judgment (fols. 292, 295, 297, 321). Wakelee acquiesced; did not appeal, as he could have done (U. S. Revised Statutes, 4980 to 4986); did not apply for a mandamus to this Court, as he might have done if the appeal had been unsuccessful.

Insurance Co. *v.* Comstock, 16 Wall., 258;
Ex parte Hohorst, 150 U. S., 653.

Your petitioner alleges the reason to be that Wakelee and his attorneys knew that if they were reinstated in the bankruptcy court they would take the chance of failing to prevent a discharge, and that if a discharge was granted, it would bar the judgment; and, as there were no assets, such a course would not be as advisable as to stay out of court and rely upon the attachments, and your petitioner avers that it is unconscionable now for Wakelee's successor to claim any reliance upon Mr. Davis's representations of law.

XIV.—And your petitioner further avers that said discharge of bankruptcy, having been properly pleaded, was, under the laws of the United States, conclusive as to the discharge of said judgment (United States Revised Statutes, 5119), and could only have been impeached by proof of some of the exceptions specified in U. S. R. S., Sections 5117 and 5118, and your petitioner therefore avers that the Circuit Court of Appeals has failed to give effect to an important provision of the laws of the United States, and in that respect is in conflict with many decisions of this Court.

XV.—Your petitioner urges the following as reasons for bringing this case within the rules of this Court allowing a certiorari:

1. That the said Circuit Court of Appeals, in failing to give effect to the discharge in bankruptcy, is in conflict with many well-founded decisions of this Court.

2. That the Circuit Court of Appeals was in error in holding that the decision of this Court on said equity appeals was controlling upon said Circuit Court of Appeals.

3. That said Circuit Court of Appeals was in error in holding that the dismissal of said specifications of opposition was caused by an assertion on the part of Mr. Davis that said judgment would not be discharged, and in holding that if such assertion was made, it was an assertion which could not be repudiated in the present litigation, and was in error in failing to distinguish between assertions of fact and assertions of a doubtful proposition of law.

Wherefore, Your petitioner prays that this honorable Court would be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit, to bring up this case

and the record thereof to this honorable Court for such proceedings therein as to this honorable Court may seem just; and your petitioner prays for such other or further relief in the premises as may be just and equitable.

ERWIN DAVIS,
Petitioner.

STATE OF NEW YORK,
Southern District of New York, } ss.:
City and County of New York,

ERWIN DAVIS, being duly sworn, says: I am the petitioner herein. I have read the foregoing petition, and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

ERWIN DAVIS.

Sworn to before me this 11th day of June, 1895.

GEORGE A. BAKER,
Notary Public,
[L. S.] N. Y. Co.

We hereby certify that we have examined the foregoing petition, and, in our opinion, the petition is well-founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

WALTER S. LOGAN.
CHARLES M. DEMOND.

of counsel

U. S. CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

DAVIS,

Plaintiff in Error,

vs.

CORNWALL,

Defendant in Error.

WALLACE, Circuit Judge..

This is a writ of error by the defendant in the Court below to review a judgment for the plaintiff entered upon the verdict of a jury by the direction of the Trial Judge. The action was brought upon a judgment recovered by the plaintiff against the defendant December 18, 1872, in the District Court of the Fifteenth Judicial District of the State of California. The defence was that the defendant had duly obtained a discharge from all his debts, including the judgment, by a decree of the United States District Court for the District of California, in a proceeding in bankruptcy.

The ruling of the Trial Judge in directing a judgment for the plaintiff proceeded upon the theory that the defendant was estopped from asserting this defence by his conduct in the course of the bankruptcy proceeding. The correctness of this ruling is the principal question presented by the assignments of error.

Whether the defendant was estopped depends upon the followings facts: It appeared that after the defendant had been adjudged a bankrupt, the plaintiff, who was then a creditor of the defendant, and had filed a proof of debt founded upon var-

ious promissory notes made by the defendant, obtained leave of the court in the bankruptcy proceeding to sue and enforce his demands against the defendant in the courts of the State, and commenced a suit which resulted in the judgment upon which the present action was brought. After the judgment had been rendered the defendant applied in the bankruptcy proceeding for a discharge from his debts, and the plaintiff filed specifications in opposition thereto, setting up the existence of various grounds disentitling the defendant to a discharge. Thereupon the defendant applied to the Court in the bankruptcy proceeding for an order dismissing the specifications of the plaintiff and cancelling the plaintiff's proof of debt. This application was opposed by the plaintiff, but was granted by the Court. The petition on which the application was founded set forth as the only grounds the statement that after the plaintiff had proved his debt, and had obtained leave to commence an action in the State court, he commenced such an action in the Fifteenth Judicial District Court of the State of California, and recovered a judgment against the bankrupt, the defendant therein, and that said judgment still stood of record in the said court, and was in full force. The plaintiff did not attempt to review the order by a petition of appeal, or otherwise, but acquiesced in the decision.

Inasmuch as the sole basis for the order of the Court, in the bankruptcy proceeding, was the averment, in the petition of the bankrnpt, that the plaintiff had recovered the present judgment, and that said judgment was in full force, it would seem obvious that the decision embodied in the order cancelling the proof of debt and dismissing the specifications, must have proceeded upon the ground that the plaintiff, because of his judgment, had no rights or interests to protect in the bankruptcy court. This conclusion could only have been reached upon the view that the plaintiff's judgment could not be affected by a discharge of the defendant in

bankruptcy. Manifestly, it was the purpose of the petition to induce this view, and the object was accomplished by it.

The ruling of the Trial Judge thus presents the question whether the defendant, after having obtained a decision in the bankruptcy proceeding precluding the plaintiff from contesting his right to a discharge, upon the ground that the discharge could not affect the judgment, can be permitted, when sued upon the judgment, to deny what he then asserted, and impeach, as erroneous, the order which he procured the Court to make, to the prejudice of the plaintiff, while retaining its benefit himself. We think this question is settled adversely to the defendant by the recent decision of the Supreme Court in Davis *v.* Wakelee (Sup. Court Rep., vol. 15, 555). That was a suit in equity, brought in the United States Circuit Court for the Southern District of New York by the assignee of Henry P. Wakelee, alleging that she was about to commence an action at law in that court to enforce a judgment recovered by her assignor against the defendant in a California court, and praying for a decree in aid of such action adjudging the defendant to be estopped from asserting a defence that the judgment was void for want of jurisdiction of the person of the defendant by the court in which it was rendered, and from setting up his discharge in bankruptcy as a defence. The estoppel claimed was predicated of facts precisely similar to those in the present case, viz., the recovery of the judgment by Wakelee after defendant had been adjudicated a bankrupt, and after leave to sue had been granted in the bankruptcy proceeding; the application of the bankrupt for his discharge, and opposition thereto by Wakelee; the application by the defendant in the bankruptcy proceeding for an order cancelling Wakelee's proof of debt and dismissing his specifications opposing the discharge; and the granting of the order and the acquiescence of Wakelee

therein. The petition upon which the order was obtained was identical with that in the present case, except as to the name of the creditor and the date and amount of the judgment. The Circuit Court sustained the bill, and made a decree restraining the defendant from asserting the invalidity of the judgment. That court, however, declined to decide whether the defendant was estopped from pleading his discharge, holding that the complainant could avail herself of any such estoppel in an action at law, and did not need the assistance of a court of equity. Upon an appeal by defendant from this decree, the Supreme Court was of the opinion that the defendant was estopped from claiming that the judgment of the California court was void for want of jurisdiction, and affirmed the decree of the Circuit Court. That court, after considering the question whether the complainant could resort to equity, or could get the benefit of the estoppel in the action at law, and expressing the opinion that the remedy at law was not so plain or clear as to oust a court of equity of jurisdiction, proceeded to discuss the case upon the merits, and used the following language: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not, thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." * * * "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it."

This decision is controlling, and renders any discussion of the question now before us superfluous. The appellant attempts to parry the force of the decision by urging that the case then before the court differed from the present case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding, that the judgment was in full force. The Court, however, did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but put its conclusions upon the salutary doctrine of estoppel which prohibits parties from playing fast and loose with courts of justice. Indeed, all the statements in the petition which was the basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the Court was of the opinion that although the defendant in making them was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and by conclusive presumption could not have been misled by the defendant's statement that the judgment was in full force, when, in fact, it was a nullity because of want of jurisdiction of the Court which rendered it. He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal rights by a judicial tribunal to his disadvantage and for the benefit of the defendant; and if he chose to acquiesce, the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then mentioned was a delusion and that the disposition made was wrong.

The assignments of error impugn the rulings of the Trial Judge in admitting in evidence the arguments made by counsel in the bankruptcy proceeding upon the application for the order cancelling the plaintiff's proof of debt and dismissing the specifications. It may be that the statements made

on that occasion by the counsel for the defendant ought not to be imputed to and used as the representations of the defendant to the Court. However this may be, the arguments were admissible for the purpose of showing what question was before the Court; and in any event the admission of the evidence was innocuous, because, as we have shown, it was obvious from the petition itself that the order proceeded upon the grounds that the plaintiff's judgment could not be affected by a discharge of the defendant in bankruptcy, and the Trial Judge would have been justified in so ruling without looking further.

We conclude that there was no error in the rulings of the Trial Judge, and that the judgment should be affirmed.

(Endorsed) U. S. Cir. Ct. of Appeals, Second Cir. Davis, plff. in error, *v.* Cornwall, deft. in error. Opinion, Wallace, Cir. Judge. United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1895. James C. Reed, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 181.—October Term, 1894.

Erwin Davis, Appellant, vs. Angelica Wakelee.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[March 11, 1895.]

This was a bill in equity, filed by Angelica Wakelee, a citizen of the State of California, against Davis, a citizen of New York, to enforce an estoppel, and to enjoin the defendant from asserting, in defense of any suit which may be brought upon a certain judgment recovered by Henry P. Wakelee against Davis, in one of the State courts of California, that the debts upon which such judgment was obtained were not merged in such judgment, and from denying the validity of the judgment, as a debt against Davis, unaffected by his discharge in bankruptcy.

The bill averred, in substance, that, in August and September, 1869, Davis executed six promissory notes, amounting to about $15,725, to the order of Henry P. Wakelee, and delivered them to him, and that they subsequently became the property of the plaintiff; that on or about September 30, 1869, Davis was adjudged a bankrupt upon his own petition, by the District Court for the District of California, and the notes in question were duly proved against his estate; that on July 8, 1873, the bankruptcy court granted the said Henry P. Wakelee leave to bring an action upon these notes, and that such action was begun by publication of a summons, under the laws of the State, and without personal service upon Davis; that on November 18, 1873,

Davis not appearing, and no service having been made upon him, judgment was entered against him in the sum of $22,760.26.

The bill further alleged that on December 23, 1875, Davis filed in the bankruptcy court a petition for his discharge, and that Wakelee thereupon filed specifications of opposition, which Davis moved to dismiss, upon the ground that Wakelee, subsequent to the commencement of the proceedings in bankruptcy, had, by leave of the Court, brought suit upon such notes, obtained judgment thereon, "and that said judgment still stood of record in said fifteenth District Court, and was in full force." That such motion came on for argument, and it was there claimed by counsel duly authorized to represent Davis that, by reason of the above facts, the original debt of Davis to Wakelee, which had been proved up in the bankruptcy proceeding, had become merged in the judgment obtained November 18, 1873, in the State Court of California, and thereby became a new debt, created since the adjudication of Davis as a bankrupt. That such judgment was subsisting, valid and enforceable, and would not be barred, discharged, or in anywise affected by the discharge of the defendant in bankruptcy. That by reason thereof, Wakelee had no standing, was not interested in the bankruptcy proceedings, and was not, therefore, competent to oppose the discharge of Davis. That upon such motion an order was made by the District Court in bankruptcy that Wakelee's proof of debt be cancelled, and his specifications of opposition to the discharge be dismissed and set aside. That Wakelee relied upon the claims and admissions of Davis and of his counsel, and accepted as correct and binding the order of the District Court dismissing his opposition, and did not appeal therefrom. That the order was accepted by Davis, who subsequently obtained his discharge.

That the judgment was subsequently assigned to Angelina Wakelee, the plaintiff, and in equity was

of full and binding force and validity by reason of the facts above stated; but that in sundry actions instituted upon such judgment between Davis and the then owner of the judgment, Davis claimed and set up that the judgment was void, because of the lack of jurisdiction of the court wherein it was entered, for the reason that he was not personally served with process, and did not appear in the action, and also pleaded his discharge in bankruptcy as a bar to a recovery upon such judgment. That plaintiff is about to commence an action at law upon such judgment against Davis in the State of New York, wherein defendant now resides, and that she is informed that, under the law of the State of New York, the facts herein set forth cannot be pleaded in the plaintiff's complaint in aid of her cause of action, but that such action must be brought upon such judgment alone, and that it is necessary to allege in the complaint either the facts showing the jurisdiction of the court, or that the judgment was *duly* entered, which cannot be truthfully done.

Wherefore plaintiff prayed for the assistance of a court of equity to adjudge Davis to be estopped by his conduct, and that he be enjoined from asserting that the debts proved up by Wakelee against him were not merged in the judgment, or from asserting the invalidity of the judgment, or that the same does not constitute a new debt, unaffected by Davis's final discharge in bankruptcy.

A demurrer was filed to this amended bill, which was overruled (38 Fed. Rep., 878), and defendant answered, admitting, denying or ignoring the several allegations of the bill, but setting up no new matter.

Upon a final hearing upon pleadings and proofs, the plaintiff was awarded a decree for an injunction restraining the defendant from asserting that the judgment of Novemebr 18, 1873, was invalid, and did not still stand of record (44 Fed. Rep.,

532). From this decree the defendant appealed to this court.

Mr. Justice Brown delivered the opinion of the court.

Motion was made to dismiss the appeal in this case, upon the ground (1) that the appearance of Mr. Henry A. Root as counsel for the appellant herein, which was entered at the time the case was docketed, was unauthorized by him and made without his knowledge; and (2) that the appeal bond is defective in falling to state the term at which the decree of the circuit court was rendered.

1. So far as the first ground is concerned, it appears that Mr. Root, then residing in the City of New York, was solicitor for the defendant in the court below; that he had taken no steps to sever his connection with the case by substituting other counsel; and that his appearance in this court was entered at the time the case was docketed, by other counsel, in good faith, and by virtue of a supposed authority from him. Under these circumstances, and, inasmuch as other counsel have appeared and taken charge of the case, the appellant should not lose his right to a review of the case by this court through a mistake which not only appears to have been purely accidental, but one which could not possibly have prejudiced the appellee. It was held by this Court in the case of *United States* v. *Curry* (6 How., 106, 111) and *Tripp* v. *Santa Rosa Street Railroad* (144 U. S., 126) that service of a citation on appeal upon the solicitor in the court below was good, upon the ground that no attorney or solicitor can withdraw his name after he has once entered it without the leave of the Court; and while his name continues on the record the adverse party has the right to treat him as the authorized attorney or solicitor, and service of notice upon him is as valid as upon the party himself. That even after the

case is finally decided the Court will not permit an attorney who has appeared at the trial to withdraw his name, and thus to embarrass and impede the administration of justice. While it does not follow that the attorney or solicitor in the court below is presumed to continue as such, after the docketing of the case in this court, the fact that Mr. Root had charge of the case in the Circuit Court might have induced the counsel, who entered his appearance in this court, to believe that it was authorized by him. As the petition was signed and sworn to by the appellant in person, there can be no claim that the appeal was taken without authority.

2. The second ground is that the appeal bond is defective, in failing to mention the term at which the decree was rendered. This ground is also insufficient. To a person reading the bond, there could be no mistaking the identity of the decree appealed from. The bond is properly entitled in the cause, the name of the court is correctly given, and there is nothing to indicate that a decree had been rendered in any other cause between the same parties in that court. Of a similar mistake it was said by the Chief Justice in *New Orleans Insurance Co.* v. *Albro Co.* (112 U. S., 506, 507): "The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security."

3. The facts of this case are not complicated, nor its merits difficult to understand. Henry P. Wakelee held six promissory notes, executed by Davis, in August and September, 1869. On September 30, 1869, Davis was adjudicated a bankrupt upon his own petition, in the District Court of California, and in July, 1873, Wakelee applied for and was granted leave to reduce his claim to judgment

in the State Court. On July 19, 1873, Wakelee brought suit in the District Court of the Fifteenth Judicial District of California, and obtained a judgment in the following November, upon a service, by publication only, in the sum of $22,760.26 in gold. As Davis, who then lived in New York, was never served with process, and never appeared in the action, such judgment was undoubtedly void. *Pennoyer* v. *Neff* (95 U. S., 714).

Subsequently, and in December, 1875, Davis filed his petition for discharge, and Wakelee filed specifications of opposition thereto, which Davis moved to dismiss, upon the ground that Wakelee had reduced his claim to judgment, since the commencement of the bankruptcy proceedings; that such judgment was in full force, and (argumentatively) would be unaffected by the discharge. The Court took this view, cancelled the proofs of debt, and dismissed the specifications of opposition to his discharge. Wakelee did not appeal. The question before us is, whether Davis is now estopped to claim that the judgment is void for want of jurisdiction.

Defendant's principal contention is that a court of equity has no jurisdiction of this case, not only because a bill will not lie to enjoin a person from setting up a defense in an action which may never be brought, but that the plaintiff may avail herself of the alleged estoppel *in pais* in any action at law she may choose to bring upon the California judgment. Bills in equity to enjoin actions at law are not infrequently brought by defendants in such actions to enable them to avail themselves of defenses which would not be valid at law. Examples of such bills are found in the case of *Drexel* v. *Berney* (122 U. S., 241), wherein a bill was sustained by a defendant in an action at law, to enjoin the plaintiff in such action from setting up certain facts, of which it was claimed she was equitably estopped to avail herself in such action; and in the recent case of *Wehrman* v. *Conklin* (155 U. S., 314), decided at the present term, in which a bill

was sustained by a defendant in ejectment, to enjoin the plaintiff from availing himself of a deed, against the use of which he was held to be equitably estopped. Analogous cases are those in which bills have been sustained to enable a defendant to make use of an equitable set off (*Rolling Mill Co.* v. *Ore and Steel Co.*, 152 U. S., 596; *Green* v. *Darling*, 5 Mason, 201, 209; *Howe* v. *Sheppard*, 2 Sumner, 409; *Duncan* v. *Lyon*, 3 Johns. Ch., 351; *Dale* v. *Cooke*, 4 Johns, Ch., 11).

While our attention has not been called to any case wherein a bill has been sustained in favor of a *plaintiff* in a proposed action at law, to enjoin the defendant from setting up a threatened defense, upon the ground that he is equitably estopped from so doing, we know of no good reason why he should not be permitted to do so, unless his remedy at law be plain, adequate and complete. And therein lies the stress of defendant's argument in this case.

We are not impressed with the strength of his position in this connection, that this is a bill to declare future rights, within the principle of *Cross* v. *De Valle* (1 Wall., 1), wherein the Circuit Court was held not to have erred in dismissing a cross bill, in which it was called upon to declare the fate of certain contingent remainders. The cross-bill was held to have been properly dismissed, upon the ground that the Court had no power to decree *in thesi*, as to the future rights of parties not before the Court, or *in esse*. The bill under consideration, however, does not involve questions of future rights, but of the present right of a party to set up a defense in an action, which may hereafter be brought against him.

Plaintiff's theory in this connection is thus stated in her bill, that "under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon said judgment, the facts subsequent to such judgment, as hereinbefore set forth, and constituting

the estoppels as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint as or in aid of the cause of action, but that such action must be brought upon such judgment alone, and that by the law of the said State of New York it is necessary in an action at law upon such judgment to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered, or that the judgment was *duly* entered, and that unless this be done the complainant would be dismissed on demurrer; that your oratrix is unable truthfully to allege in such complaint such jurisdictional facts or that such judgment was duly entered, and that your oratrix is thus remediless in an action at law," etc. In support of this contention we are cited to Section 532 of the New York Code, which reads as follows: "In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction." Appellant argues with great insistence that this refers only to courts or officers "of special jurisdiction;" and this appears to be the implication from the language and the punctuation, although this provision was taken from Section 138 of the Code of Civil Procedure of 1847, which reads as follows: "In pleading a judgment, or other determination of a court, or officer of special jurisdiction," indicating that the words "special jurisdiction" referred only to the word "officer."

The section, however, was probably intended to change the common law in some particular, and as in declaring upon judgments of courts of general jurisdiction, it was never necessary to state the facts showing jurisdiction, while the contrary was true with regard to courts of special or limited jurisdic-

tion (*Turner* v. *Rody*, 3 N. Y., 193), the provision was doubtless intended to apply to the latter class. But even supposing it were sufficient to allege simply the recovery of a judgment, the judgment record, when put in evidence, would show that personal service had never been obtained upon the defendant, and the plaintiff would inevitably be nonsuited. Whether the plaintiff could go still farther, and set up an invalid judgment and a subsequent estoppel *in pais*, appears to be under the authorities in New York and other States, a matter of considerable doubt. (*Welland Canal Co.* v. *Hathaway*, 8 Wend., 480; *Gaylord* v. *Van Loan*, 15 Wend., 308; *Hostler* v. *Hays*, 3 Cal., 302; *Bank* v. *Wollaston*, 3 Harr., 90; *Caldwell* v. *Auger*, 4 Minn., 217.)

So, too, whether the section above quoted applies to judgments rendered in other States seems to be doubtful, the New York authorities being divided upon the question.

In the uncertainty which appears to exist in that State, as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. (*Boyce's Ex'rs* v. *Grundy*, 3 Pet., 210; *Watson* v. *Sunderland*, 5 Wall., 74, 79; *Rathbone* v. *Warren*, 10 Johns., 587; *King* v. *Baldwin*, 17 Johns., 384; *American Insurance Co.* v. *Fisk*, 1 Paige Ch., 90; *Teague* v. *Russell*, 2 Stew., 420; *Southampton Dock Co.* v. *Southampton Harbour Board*, L. R. 11 Eq., 254; *Weymouth* v. *Boyer*, 1 Ves. Jr., 416.) Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.

4. If jurisdiction be conceded, there can be no doubt that the Court made a proper disposition of the case upon the facts. Davis procured the dis-

missal of Wakelee's specifications of opposition to his discharge, upon the ground that he had a valid judgment against him which was still in full force, and under the law would be unaffected by his discharge. The Court was of the same opinion, and dismissed the specifications. Wakelee acquiesced in this and did not appeal. It is true that it had theretofore been held in California that a personal judgment obtained by service by publication was valid. (*Hahn* v. *Kelly*, 34 Cal., 391.) But the case of *Pennoyer* v. *Neff* (95 U. S., 714), holding such judgments to be invalid, was not decided until the following year. This case was afterwards followed in California in *Belcher* v. *Chambers* (59 Cal., 535). The weight of authority appears also to have been that a judgment, obtained after the commencement of bankruptcy proceedings, merged the debt upon which it was obtained, and was unaffected by a subsequent discharge; though this Court subsequently held in *Boynton* v. *Ball* (121 U. S., 457) that a discharge in bankruptcy might be set up to stay the execution of a judgment recovered against a bankrupt after the commencement of proceedings in bankruptcy and before the discharge. But even if Davis had been mistaken as to his legal rights with respect to this judgment and its subsequent discharge, his assertion that it was still of record and in full force, is none the less binding upon him, in view of Wakelee's acquiescence in the ruling of the Court sustaining this contention.

It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Thus in *Philadelphia, &c., R. R. Co.* v. *Howard* (13 How., 307), where a corporation sought to defend against an instrument by showing that the corporate seal was affixed thereto without

authority, and that it was not, sealed or unsealed, intended to be the deed of the corporation, evidence was held to be admissible to show that, in a former suit, the corporation had treated and relied upon the instrument as one bearing the corporate seal. In delivering the opinion, the Court observes: "The plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington and Susquehanna Railroad Co. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible. * * * The defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, a fraud in law, if he does not know it to be true. * * * We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on a former trial was false, even if the assertion was made by mistake. If it was a mistake—of which there is no evidence—it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."

So in *Railroad Company* v. *McCarthy*, 96 U. S., 258; it appeared that defendant proved on the trial in the court below that it was impossible to forward certain cattle on Sunday, for want of cars, and it was held to be fairly presumed that no other reason was given for the refusal at that time; and that the railway company could not, in this court, set up the illegality of such a shipment on the Sabbath, under the Sunday Law of West Virginia. In delivering the opinion of the court Mr. Justice Swayne says: "Where a party gives a reason for

his conduct, and decision touching anything involved in the controversy, he cannot, after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold." To the same effect are *Railroad Co.* v. *National Bank*, 102 U. S., 14; *Daniels* v. *Tearney*, 102 U. S., 415, 421; *Everett* v. *Saltus*, 15 Wend., 474; *Holbrooke* v. *Wight*, 24 Wend., 169; *Winter* v. *Coit*, 7 N. Y., 288; *Mills* v. *Hoffman*, 92 N. Y., 181; *Wood* v. *Seely*, 32 N. Y., 105; *Ellis* v. *White*, 61 Iowa, 244; *Test* v. *Larsh*, 76 Ind., 452.

The case of *Abbot* v. *Wilbur* (22 La. Ann., 368), is directly in point. This was a suit by Abbot for the purpose of annulling a judgment obtained by Wilbur, upon the ground that such judgment had been rendered by default, and without personal service of citation upon the defendant. Wilbur pleaded in answer to this, and proved, that, in a suit by Abbot against one Borge, the latter had set up a reconventional demand or set-off to a large amount, in answer to which Abbot set up that the reconventional demand had already been reduced to judgment against him in the suit which he now sought to annul for the want of personal service. It was held that Abbot, having defeated a large demand against him by a plea that there was pending against him a suit for the same demand, he was estopped to say that the assertion was false, and that he had never been cited in such suit.

It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and, in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon

the theory that the judgment was valid--his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position.

There is another circumstance, however, which shows that Davis did not act under a *bona fide* mistake of law, and that he never intended to recognize the judgment as valid any longer than it was for his interest to do so; since, immediately after his discharge was obtained, he made application to the State court in which the judgment had been rendered for an order to vacate it upon the ground that the judgment was void by reason of the service of summons by publication, as well as that it had been barred by the discharge in bankruptcy. The Court granted his motion to vacate his judgment upon the latter ground, though this order was reversed on appeal to the Supreme Court.

Our conclusion is, that, as matter of law, appellant is now estopped to claim that the judgment of the California court was void for want of jurisdiction.

The decree of the court below is, therefore, affirmed.

True copy.

Test.

[SEAL.] JAMES H. McKENNEY,
Clerk Supreme Court U. S.

Office Supreme Court U. S.
FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

EVENING POST JOB PRINTING HOUSE—N. Y.

Supreme Court of the United States.

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IN THE MATTER OF THE PETITION OF ERWIN DAVIS FOR A WRIT OF CERTIORARI, &C., IN THE CASES OF—

ERWIN DAVIS, Plaintiff in Error, AGAINST ANGELICA WAKELEE, Defendant in Error.	Answer of Defendants in Error. 2
ERWIN DAVIS, Plaintiff in Error, AGAINST PIERRE B. CORNWALL, Defendant in Error.	

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The defendants in error above named respectfully show to this Court in answer to the petition as follows:

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1st. The appeals in equity from the decree of the Circuit Court of the United States for the Southern District of New York, filed March 9, 1891, in cases therein pending entitled Angelica Wakelee, complainant, against Erwin Davis, defendant, and Pierre B. Cornwall, complainant, against Erwin Davis, defendant, were decided by this Court on

4 appeal March 11, 1895. The appeals were argued together, and the opinion was handed down, entitled in the case of Davis *v.* Wakelee. These suits in equity were tried between the same parties as exist in the present cases and upon substantially the same evidence. The suits in equity resulted in decrees and injunctions which forbade Davis setting up in contemplated actions at law, which are the present actions, that certain judgments upon which these actions are based were void. These injunctions were granted because of certain estoppels created by said Davis by his conduct in the Bankruptcy Court. These estoppels were proven in the equity cases by copies of the
5 records of the proceedings in bankruptcy in the matter of Erwin Davis, a bankrupt, in the United States District Court for the District of California, and of the records of California State Courts showing actions resulting in the judgments sued upon herein, and upon oral testimony of what occurred upon the argument of a motion in the Bankruptcy Court made by Davis to dismiss the oppositions of Wakelee and Cornwall to his discharge and to strike out their proofs of debt in said proceedings. Upon precisely the same documents and testimony the present cases were heard in the Circuit Court before a jury, and this same evidence formed a part of the record upon which the cases were finally decided by
6 the United States Circuit Court of Appeals for the Second Circuit. This Court in affirmance in the equity cases necessarily decided the facts and law upon this evidence, and has stated the whole matter fully in its opinion.

2d. The defendants in error further aver that this Court decided in said equity cases as follows: "Subsequently, and in December, 1875, Davis filed his petition for discharge, and Wakelee filed specifications of opposition thereto, which Davis moved to dismiss, upon the ground that Wakelee had reduced his claim to judgment since

the commencement of the bankruptcy proceedings; 7
that such judgment was in full force and (argumentatively) would be unaffected by the discharge. The Court took this view, canceled the proofs of debt, and dismissed the specifications of opposition to his discharge. Wakelee did not appeal." * * * " Davis procured the dismissal of Wakelee's specifications of opposition to his discharge, upon the ground that he had a valid judgment against him which was still in full force, and under the law would be unaffected by his discharge. The Court was of the same opinion and dismissed the specifications. Wakelee acquiesced in this and did not appeal " (see pp. 20 and 23 of Petition).

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3d. The defendants in error aver that the decision of the Circuit Court of Appeals in all respects accorded with the law and facts declared as in the opinion of this Court in Davis *vs.* Wakelee and deny that said Circuit Court of Appeals erred in any respect in its decision in these cases.

4th. Defendants in error deny the statements made in paragraph four of the petition, that the judgments in these cases were discharged by Erwin Davis' discharge. Also that the grounds of Mr. Wakelee's petition for leave to sue at law upon the claim in bankruptcy were that there were no assets in the bankruptcy proceedings. Many other grounds 9
are set forth in the petition (see p. 72).

WHEREFORE, the defendants in error pray that this Honorable Court will deny the motion for a writ of *certiorari* in these cases to the Circuit Court of Appeals for the Second Circuit, and for such other and further relief in the premises as may be just and equitable.

ANGELICA WAKELEE,
PIERRE B. CORNWALL,
By their Atty.

Anson Maltby

10 STATE OF NEW YORK,
County of New York, } ss.:
Southern District of New York,

ANSON MALTBY, being duly sworn, says: I am attorney for the defendants in error in the above entitled cases. I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge. That the reason why the answer is not signed by defendants in error is that they reside in the State of California and are not within the State of New York where deponent resides.

ANSON MALTBY.

Sworn to before me this 30th day of Sept., 1895.

11 E. M. BASSETT,
Notary Public,
Kings Co.
Cert. filed in New York Co.

{ Notarial Seal. }

Office Supreme Court U. S.
FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

EVENING POST JOB PRINTING HOUSE, N. Y.

Supreme Court of the United States.

IN THE MATTER OF THE PETITION OF ERWIN DAVIS FOR A WRIT OF CERTIORARI, &C., IN THE CASES OF—

ERWIN DAVIS,
Plaintiff in Error,

AGAINST

ANGELICA WAKELEE,
Defendant in Error.

776

ERWIN DAVIS,
Plaintiff in Error,

AGAINST

PIERRE B. CORNWALL,
Defendant in Error.

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BRIEF FOR DEFENDANTS IN ERROR OPPOSING PETITION.

Point I.

The opinion of this Court in the equity appeals controlled the Circuit Court of Appeals in its decision affirming the judgments below.

Petitioner contends the reverse under Point I. of his brief.

This Court announced the broad and well known rule concerning inconsistent positions in Court thus:

"It may be laid down as a general proposition that "where a party assumes a certain position in a legal "proceeding and succeeds in maintaining that po- "sition, he may not thereafter, simply because his "interests have changed, assume a contrary po- "sition, especially if it be to the prejudice of the "party who has acquiesced in the position formerly "taken by him."

The Court of Appeals decided that this rule governed Davis' actions in this litigation, even though his inconsistent positions consisted in an assertion of a legal proposition, by reason of which he obtained judicial relief and a subsequent denial of the same proposition when he wanted a different relief concerning the same subject matter.

As is well known, the estoppel of inconsistent positions in Court is as well created by inconsistent positions concerning a legal principle as concerning the existence of a fact.

The Court of Appeals distinguishes between the estoppel of inconsistency of position in court and the common equitable estoppel which petitioner claims cannot be based on an assertion of law.

Petitioner here claims that this Court in the equity appeals decided that he was therein estopped by the common equitable estoppel of an assertion of fact.

This Court is the best interpreter of its own language.

We take, however, the view of the Court of Appeals to the contrary, and shall not enter into nice construction of words.

But, granting for argument that this Court did decide on the ground as contended by petitioner, still the Court of Appeals did not err in holding that the estoppel in the law cases was based upon Davis' inconsistent positions.

On page 3 of his brief petitioner seeks to maintain that the ruling of the Bankruptcy Court was a ruling upon a discharge not *in esse*.

It was a ruling upon the rights of Wakelee as a creditor then *in esse*. It dismissed him from its jurisdiction and was final

The estoppel decided to have existed by this Court in the equity appeals equally depended upon the finality of the same decree, and upon its being a decision on present rights.

Point II.

The Circuit Court of Appeals correctly held that Davis is estopped from asserting his discharge in bankruptcy in bar of this action.

Petitioner under Point II. of his brief treats the discharge in bankruptcy as having been *impeached.*

We did not seek to impeach it in the Circuit Court of Appeals, nor did that Court *impeach* it in its decision.

That Court simply held that Davis could not avail himself of the discharge in this case by reason of an estoppel, he having taken an inconsistent position.

To claim that Congress would have included in the bankruptcy act a provision that such a defense might be barred by estoppel if it had so intended, is absurd.

It has been held that a constitutional right may be waived.

It would be as sensible to say that it cannot be waived because the constitution does not say so.

The law of estoppel is not founded on statute, but is a general principle as old as the hills.

The discharge would be conclusive if Davis could interpose it as a defense.

We do not deny that under Boynton *v.* Ball, 121

U. S., 457, the original claim was not merged in the judgment, nor do we claim that under that decision alone the judgment is not a new debt and is not discharged.

In other words, we are not appearing before the Supreme Court to dispute the doctrine which has been settled by it in its decisions.

What we do say is that the petitioner cannot claim the benefit of the various decisions cited because he is estopped from doing so by his own conduct.

The case of McDonald *v.* Davis, 105 N. Y., 508, is not authority in this case, because there was no estoppel whatsoever in that case.

A discharge is not a bar when waived as in this case.

Point III.

The petitioner claims in Point III. that the Circuit Court of Appeals erred in holding that Davis' ground of motion to dismiss was that the judgment would not be discharged.

This point is made with ill grace to this Court, which, upon the same facts, proven by precisely the same documentary and oral evidence in the cases in equity between the same parties, decided as follows:

"Subsequently, and in December, 1875, Davis "filed his petition for discharge, and Wakelee filed "specifications of opposition thereto, which *Davis* "*moved to dismiss upon the ground that* Wakelee "had reduced his claim to judgment since the com- "mencement of the bankruptcy proceedings; that "said judgment was in full force and (argumenta- "tively) *would be unaffected by the discharge. The* "*Court took this view,* canceled the proofs of debt

" and dismissed the specifications of opposition to " his discharge. Wakelee did not appeal." * * *

" Davis procured the dismissal of Wakelee's speci- " fications of opposition to his discharge *upon the* " *ground that he had a valid judgment against him* " *which was still in full force, and under the law would* " *be unaffected by his discharge. The Court was of* " *the same opinion,* and dismissed the specifications. " Wakelee acquiesced in this and did not appeal."

See opinion of this Court, pages 20 and 24 of the petition herein and the answer herein, par. 2d.

Clearly the Circuit Court of Appeals would not have been justified in deciding except as it did, after these words of this Court.

There is no weight whatsoever in petitioner's argument. He suggests two other grounds, viz :

(*a.*) Indefinite charges in the specifications of opposition.

Considering the first (*a*) suggested ground of decision:

This ground could not justify the cancellation of Wakelee's original proofs of debt, which was granted by the order.

Because, forsooth, a creditor failed to draw his specifications of opposition correctly, it was justifiable to dismiss him, by canceling his proofs of debt from all right to amend his specifications and to have any further relief in the Court and a share in the assets !

To state such a proposition is to refute it.

Wakelee's proofs of debt had been *res adjudicata* for years and could not and would not be overthrown except on the theory that he was no longer a creditor in those proceedings.

Considering the second (*b*) suggested ground of decision:

(*b.*) That if Wakelee desired to oppose the discharge, he must first give up his rights acquired outside of the bankruptcy proceedings, and as he would

not do so, then the Court could have lawfully dismissed the opposition, for the reason that he had voluntarily yielded his rights in the bankruptcy, and deliberately elected to pursue his remedy in the State Courts.

This, too, has no substance.

It amounts to this. The Court may have held that Wakelee had the right of electing to stay in bankruptcy and give up all his proceedings outside. Or to give up his standing in bankruptcy and proceed outside.

He refused to give up his proceedings outside and the Court dismissed him from the Bankruptcy Court and deprived him of all rights therein.

Our answer is:

What is this but saying: "By reason of your conduct you have no standing here as a creditor? Being without the jurisdiction of this Court in these proceedings the discharge will not affect you!"

And Davis now says: "You had the right of election, exercised it. The Court was wrong. You cannot avail yourself of its solemn final judicial decision!"

Point IV.

The judgment creditors had a right to rely and did rely upon Davis' representations, enforced as they were by the order or decree in bankruptcy, and there is no risk involved in so relying.

The petitioner's Point IV. hardly needs examination.

Supposing a man does feel that a Court having jurisdiction has in a final decree decided a principle of law or fact incorrectly, and that although he has a right of appeal, yet it is for his advantage to stand upon that decision?

He surely has a right to do so. The principle of law or the fact decided is *res judicata.*

The decree or order was procured by Davis taking a certain position as to the Court.

It binds all parties and is conclusive.

Point V.

The motion being frivolous and for delay should be dismissed, with costs and penalty.

This application is most audacious.

It is equivalent to asking the Supreme Court to overrule its own findings of fact and law, and to reverse the Circuit Court of Appeals for adopting these findings themselves. The only conclusion consistent with reason is that counsel are simply seeking delay without hope of success.

ANSON MALTBY,
Of Counsel for Defendants in Error.

7776 163 U S 663

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

ERWIN DAVIS,
Plaintiff in Error,

vs.

ANGELICA WAKELEE,
Defendant in Error.

TRANSCRIPT OF RECORD.

Error to the Circuit Court of the United States for the Southern District of New York.

PRINTED UNDER THE DIRECTION OF THE CLERK.

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United States of America, ss.: 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Angelica Wakelee, plaintiff, and Erwin Davis, defendant, a manifest error hath happened, to the great damage of the said Erwin Davis, defendant, as is said and appears by the complaint: 2
we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 10th day of February, 1893, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit 3
may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and

4 of the Independence of the United States the one hundred and seventeenth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the
[L. S.] United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern Dis-
5 trict of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 160 inclusive, contain a true and complete transcript of the record and proceedings had in the said Court in the cause of Erwin Davis, plaintiff in error, against Angelina Wakelee, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of January, in the year of our Lord one thousand eight hundred
6 and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

[L. S.] JOHN A. SHIELDS,
Clerk.

(Endorsed)—The United States Circuit Court of Appeals for the Second Circuit.—Erwin Davis, Plaintiff in Error, *vs.* Angelica Wakelee, Defendant in Error.—*Original.*—Writ of Error & Proof of Service.—Logan, Clark & Demond, Attorneys for Plaintiff in Error, 58 William St., N. Y. City.—Due service of a copy of the within Writ of Error is hereby admitted this 13th day of January, 1893.

UNITED STATES CIRCUIT COURT OF APPEALS 7

FOR THE SECOND CIRCUIT.

ERWIN DAVIS,
Plaintiff in Error,

AGAINST

ANGELICA WAKELEE,
Defendant in Error.

Affidavit of Service.

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City and County of New York, ss.:

MARX E. HARBY, being duly sworn, says: That he is of the age of 21 years and upwards, and that on the 13th day of January, 1893, at 48 Wall street, in the City of New York, State of New York, he served a copy of the annexed writ of error on Anson Maltby, the attorney for the defendant in error in this action, by delivering a copy of the same to him personally and leaving the same with him, and exhibiting to him the signature of the Justice on the original thereof; and he further says that he knows the person so served as aforesaid to be the attorney 9 for Angelica Wakelee, the person mentioned and described in said writ of error.

MARX E. HARBY.

Sworn to before me this 13th day of January, 1893.

F. H. KNIGHT,
Notary Public,
New York County.

[SEAL.]

10 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE

AGAINST

ERWIN DAVIS.

TO THE ABOVE NAMED DEFENDANT:

11 You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New York, this 8th day of January, in the year one thousand eight hundred and ninety-one.

[SEAL.] JOHN A. SHIELDS,
Clerk.

ANSON MALTBY,
12 Plaintiff's Attorney.
Office and Post Office address,
48 Wall St.,
New York City.

(Endorsed)—We admit service of the within summons for Dft.—Edwin Davis, Apl. 14, 1891.—Kenneson, Crain & Alling, Atty's for Defts.—I certify that the within summons was served as appears by the foregoing admission of service.—John W. Jacobs, U. S. Marshal.—Jul. 7, 1891.—I hereby depute Wm. T. Smith to serve the within summons.—John W. Jacobs, U. S. Marshal, N, Y., March 19, 1891.—United States Cir-

cuit Court, Southern District of New York.— 13
Angelica Wakelee, Plaintiff, *vs.* Erwin Davis, Defendant.—Summons.—To the defendant within named: Take notice, that upon default judgment will be taken for the sum of $22,809 $\frac{26}{100}$ dollars, in money, with interest at the rate of 7% from the 18th day of November, 1873, besides costs.—Anson Maltby, Plaintiff's Attorney.—I hereby depute C. E. Warner to serve the within writ, John W. Jacobs, U. S. Marshal, S. D. of N. Y., N. Y., Jany. 8, '91.—U. S. Circuit Court.—Filed Jul. 17, 1891.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES 14

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE,
Plaintiff,

vs.

ERWIN DAVIS,
Defendant.

The plaintiff, complaining of the defendant, by this her amended complaint alleges, upon information and belief,

15

For a first, separate and distinct cause of action:

I.—That plaintiff is a citizen of the State of California and resides therein in the City of San Francisco.

II.—That defendant is a citizen of the State of New York and resides therein in the City of New York.

III.—That on the eighteenth day of November, 1873, the District Court of the Fifteenth Judicial District of the State of California in and for the

16 City and County of San Francisco was a court of general jurisdiction, duly created by the laws of that State.

IV.—That on the eighteenth day of November, 1873, in said City and County of San Francisco, one Henry P. Wakelee, in an action wherein said Wakelee was plaintiff and this defendant was defendant, recovered a judgment in said Court against this defendant by the terms of which judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$
17 dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars.

V.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw for value sold and assigned the said judgment to this plaintiff who is still the owner thereof.

VI.—That no part thereof has been paid and the
18 whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

For a second separate and distinct cause of action:

VII.—That plaintiff is a citizen of the State of California and resides therein in the City of San Francisco.

VIII.—That defendant is a citizen of the State of New York and resides therein in the City of New York.

IX.—That on the eighteenth day of November, 1873, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a Court of General Jurisdiction, duly created by the laws of that State.

X.—That on the eighteenth day of November, 1873, in said City and County of San Francisco, one Henry P. Wakelee, in an action wherein said Wakelee was plaintiff and this defendant was defendant, recovered a judgment in said Court against this defendant, by the terms of which judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant Erwin Davis, in United States gold coin, the sum of twenty-two thousand, seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand, eight hundred and nine $\frac{26}{100}$ dollars.

XI.—That said judgment was duly given, made and entered by said District Court.

XII.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw, for value, sold and assigned the said judgment to this plaintiff, who is still the owner thereof.

XIII.—That no part thereof has been paid and the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

For a third separate and distinct cause of action.

22 XIV.—That plaintiff is a citizen of the State of California and resides therein in the City of San Francisco.

XV.—That defendant is a citizen of the State of New York and resides therein in the City of New York.

XVI.—That on the eighteenth day of November, 1873, and for a year previous thereto, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a Court of General Jurisdiction, duly created by the laws of that State.

23 XVII.—That on or about the 19th day of July, A. D. 1873, one Henry P. Wakelee commenced an action in the said Court against the said Erwin Davis, and in the due course of the said action, on the 18th day of November, 1873, the said Henry P. Wakelee obtained a judgment of said Court in his favor and against the said Erwin Davis, which said judgment still stands of record in said District and is in full force.

XVIII.—That by the terms of said judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant Erwin Davis, in United States gold coin, the sum of
24 twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand, eight hundred and nine $\frac{26}{100}$ dollars.

XIX.—That said judgment was so given and recovered within jurisdiction in said Court of the person of said defendant (who was not then a resident of California) except by service by publication of the

summons in said action by order of said Court and 25
in accordance with the Statutes of the State of California in such case made and provided and without any proceeding *in rem*.

XX.—That subsequently at various times during the year 1876, in open court during certain proceedings in bankruptcy pending in the United States District Court for the District of California, entitled "In the Matter of Erwin Davis, a Bankrupt," wherein this defendant was the bankrupt, this defendant as a means to procure his discharge in bankruptcy solemnly asserted said judgment to be and adopted the same as valid, still standing of record in said Fifteenth District and in full force, 26
and by reason of and based upon such assertion and adoption did procure an order and adjudication of said Court in bankruptcy dismissing the specifications of opposition to his discharge in bankruptcy filed by said Henry P. Wakelee, and did therefore and thereafter procure such discharge.

XXI.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw for value sold and assigned the said judgment to this plaintiff, who is still the owner thereof.

XXII.—That no part thereof has been paid, and 27
the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

XXIII.—That said judgment recovered November 18th, 1873, was duly given, made and entered by said District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

And for a fourth separate and distinct cause of action:

28 XXIV.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

XXV.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

XXVI.—That on the eighteenth day of November, 1873, and for a year previous thereto, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a Court of General Jurisdiction duly created by the laws of that State.

29

XXVII.—That on or about the 19th day of July, A. D. 1873, one Henry P. Wakelee commenced an action in the said Court against the said Erwin Davis, and in the due course of the said action, on the 18th day of November, 1873, the said Henry P. Wakelee obtained a judgment of said Court in his favor and against the said Erwin Davis, which said judgment still stands of record in said District and is in full force.

XXVIII.—That by the terms of said judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant
30 Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars.

XXIX.—That said judgment was so given and recovered without jurisdiction in said Court of the person of said defendant (who was not then a resident of California) except by service by publication

of the summons in said action by order of said Court and in accordance with the statutes of the State of California in such case made and provided and without any proceeding *in rem*. 31

XXX.—That subsequently at various times during the year 1876, in open Court during certain proceedings in bankruptcy pending in the United States District Court for the District of California, entitled "In the Matter of Erwin Davis, a Bankrupt," wherein this defendant was the bankrupt, this defendant as a means to procure his discharge in bankruptcy solemnly asserted said judgment to be and adopted the same as valid, still standing of record in said Fifteenth District and in full force, and by reason of and upon such assertion and adoption did procure an order and adjudication of said Court in bankruptcy dismissing the specifications of opposition to his discharge in bankruptcy filed by said Henry P. Wakelee and did therefore and thereafter procure such discharge. 32

XXXI.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw for value sold and assigned the said judgment to this plaintiff who is still the owner thereof.

33

XXXII.—That no part thereof has been paid and the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

XXXIII.—That in a certain suit in equity in this Court, wherein this plaintiff was complainant and this defendant was defendant, brought upon the above alleged facts, after due appearance and answer by the defendant and in due course of said suit a decree was duly given, made and entered March 9, 1891, whereby it was ordered, adjudged and de-

creed that said defendant Erwin Davis, his heirs, assigns, executors and administrators be and they and each and every of them, are forever estopped from claiming, alleging or setting up against the complainant, Angelica Wakelee, her heirs, executors, administrators and assigns, or any or either of them, by answer, demurrer, plea or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity, or in any proceeding whatever in this or in any other jurisdiction, and from in any manner whatsoever and wheresoever maintaining, that said judgment (of November 18, 1873) was not duly given, made or entered by a Court having competent jurisdiction, is not valid and does not still stand of record in said District Court of said Fifteenth Judicial District, and is not in full force against the said defendant Erwin Davis, his heirs, executors, administrators and assigns or any and every of them.

XXXIV.—And it was further ordered, adjudged and decreed in said equity suit that a perpetual injunction to this effect be issued against said Erwin Davis; and thereupon such other proceedings were had that said perpetual injunction was duly issued, of all which the said defendant Erwin Davis had due notice.

XXXV.—That said judgment recovered November 18, 1873, was duly given, made and entered by said District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

Wherefore, the plaintiff demands judgment against the defendant Erwin Davis, in the sum of twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars ($22,809.26), in United States gold coin, with interest at the rate of seven per cent. per annum from November 18, 1873, besides the costs and disbursements of this action.

ANSON MALTBY,
Attorney for Plaintiff.

SOUTHERN DISTRICT OF NEW YORK, }
State of New York, } ss.:
City and County of New York, }

ANSON MALTBY, being duly sworn, says: That he is the attorney for the plaintiff herein and resides at New Rochelle, in the County of Westchester; that the foregoing complaint is true to the knowledge of the deponent, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that the sources of his knowledge and the grounds of his belief as to all matters therein not stated upon his knowledge are as follows: The possession and inspection of exemplified copies of the judgment roll entered in the action alleged in the foregoing complaint and of records docketed, in the matter of Erwin Davis, a bankrupt, in the United States District Court for the District of California, and the inspection of documents forming the judgment roll filed in a suit in equity in the United States Circuit Court for the Southern District of New York, March, 1891, wherein this plaintiff was complainant and this defendant was defendant.

Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not within the said county of Westchester nor within the State of New York.

ANSON MALTBY.

Sworn to before me this 15th }
day of February, 1892. }

FIELDING L. MARSHALL,
[SEAL.] Notary Public,
N. Y. Co.

City and County of New York, ss.:

FREDERICK N. KANNOFSKY, being duly sworn, says: That he is 16 years of age and upward; that on the 16th day of February, 1892, between the hours of 12 M. and 1 P. M., at their offices in the Mills Building, in the City of New York, he served the foregoing

amended complaint upon defendant's attorneys in this action by delivering to and leaving with the person in charge of said office, personally, a true copy thereof.

FREDERICK N. KANNOFSKY.

Sworn to before me this 16th day of February, 1892.

FIELDING L. MARSHALL,
[SEAL.] Notary Public,
N. Y. Co.

(Endorsed)—U. S. Circuit Court. Southern District of New York.—Angelica Wakelee, Plaintiff, against Erwin Davis, Defendant.—Amended Complaint.—Anson Maltby, Attorney for Plaintiff, 48 Wall Street, New York City.—U. S. Circuit Court.—Filed Feb. 16, 1892.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE,
Plaintiff,

AGAINST

ERWIN DAVIS,
Defendant.

The defendant Erwin Davis, by Kenneson, Crain & Alling, his attorneys, answering the amended complaint of the plaintiff herein by this his amended answer, alleges as follows:

I.—This defendant denies any knowledge or information sufficient to form a belief as to any or all

of the allegations contained in paragraphs I., III., 43
IV. and V. of the complaint herein.

II.—He denies, as alleged in Paragraph VI. of the complaint, that the whole amount of the judgment therein referred to still remains due and owing, or that any amount is due and owing to the plaintiff from this defendant.

III.—For a further and separate defense to the first cause of action set forth in the amended complaint, this defendant, on information and belief, alleges as follows:

(1) That prior to the 11th day of September, 1869, 44
this defendant made and delivered to one Henry P. Wakelee six promissory notes, in writing, in the words and figures following, that is to say:

"$1,804.65. SAN FRANCISCO, August 26, 1869.

"On the 25th day of September, 1869, at three "o'clock P. M. of that day (no grace), for value re- "ceived, in gold coin of the Government of the "United States, I promise to pay to the order of H. "P. Wakelee, at the Bank of California in this "city, eighteen hundred and four $\frac{65}{100}$ dollars, with "interest from date at the rate of one per cent. "per month until paid, payable monthly, both prin- "cipal and interest payable in the like gold coin. 45

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, August 26, 1869.

"On the 25th day of October, 1869, at three "o'clock P. M. of that day (no grace), for value re- "ceived, in gold coin of the Government of the "United States, I promise to pay to the order of H. "P. Wakelee, at the Bank of California, in this city, "nineteen hundred and sixty-five dollars, with in- "terest from after due at the rate of per cent. "per month until paid, payable monthly, both

"principal and interest payable in the like gold
"coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, August 26, 1869.

"On the 24th day of November, 1869, at three
"o'clock P. M. of that day (no grace), for value re-
"ceived, in gold coin of the Government of the
"United States, I promise to pay to the order of H.
"P. Wakelee, at the Bank of California, in this
"city, nineteen hundred and sixty-five dollars, with
"interest from after due at the rate of per
"cent. per month until paid, payable monthly, both
"principal and interest payable in the like gold
"coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, August 26, 1869.

"On the 24th day of December, 1869, at three
"o'clock P. M. of that day (no grace), for value re-
"ceived, in gold coin of the Government of the
"United States, I promise to pay to the order of H.
"P. Wakelee, at the Bank of California, in this
"city, nineteen hundred and sixty-five dollars, with
"interest from after due at the rate of per
"cent. per month until paid, payable monthly, both
"principal and interest payable in the like gold
"coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, August 26, 1869.

"On the 23d day of January, 1870, at three o'clock
"P. M. of that day (no grace), for value received, in
"gold coin of the Government of the United States,
"I promise to pay to the order of H. P. Wakelee,
"at the Bank of California, in this city, nineteen
"hundred and sixty-five dollars, with interest from
"after due at the rate of per cent. per month
"until paid, payable monthly, both principal and
"interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

" SAN FRANCISCO, September 8, 1869. 49

" On demand I promise to pay to H. P. Wakelee " or order, six thousand and fifty-five $\frac{35}{100}$ dollars " in gold coin, with interest from date at the rate of " one per cent. a month.

" $6,055.35.

" (Signed) ERWIN DAVIS."

(2.) That subsequent to the said making and delivery of said notes, and on or about September 11, 1869, this defendant filed in the United States District Court for the District of California, his petition to be adjudged a voluntary bankrupt. That thereafter and on or about September 30, 1869, this defendant was by a decree of said United States District Court adjudged a bankrupt. 50

(3.) That subsequent to said decree of said United States District Court in bankruptcy, and subsequent to September, 30, 1869, said Henry P. Wakelee duly proved said promissory notes as alleged debts due to him from this defendant against the estate of this defendant in said bankruptcy proceedings.

(4.) That subsequent to said proof of said notes in said bankruptcy proceedings, and on or about the 28th day of June, 1873, said Henry P. Wakelee noticed a motion and filed in said bankruptcy proceedings in said United States District Court for the District of California, a petition for leave to use this defendant. 51

(5.) That thereafter, and on or about July 8, 1873, an order was entered in said United States District Court in said bankruptcy proceedings, granting said Henry P. Wakelee leave to bring an action upon said promissory notes against this defendant.

(6.) That thereafter, pursuant to said order of leave, said Henry P. Wakelee began in July, 1873,

52 an action against this defendant upon said promissory notes, in the District Court for the Fifteenth Judicial District in the State of California, in and for the City and County of San Francisco.

(7.) That thereafter, and on the 18th day of November, 1873, in said action, said Henry P. Wakelee obtained a judgment against this defendant in the said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, by the terms of which judgment it was ordered, adjudged and decreed that said Henry P. Wakelee, the plaintiff in said action, have and recover from this defendant,
53 the defendant therein, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, until paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars.

(8.) That thereafter, and subsequent to the entry of said judgment of November 18, 1873, and on or about December 23, 1875, this defendant filed in the United States District Court for the District of Cali-
54 fornia, in said bankruptcy proceedings, a petition for the discharge of this defendant in bankruptcy; and thereafter, and on or about the 6th day of March, 1877, at San Francisco, in the County of San Francisco, in the State of California, the said District Court of the United States for the District of California, did, by its decree, order and judgment, grant to this defendant a certificate of discharge, a copy whereof is hereto annexed, marked Exhibit "A," and made a part of this answer.

(9.) That the plaintiff's claims and demands alleged in the complaint in said action by H. P.

Wakelee against this defendant, in the said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, which resulted in said judgment of November 18, 1873, existed before September 11, 1869, the date when this defendant, as hereinbefore alleged, petitioned to be adjudged a voluntary bankrupt, and before September 30, 1869, the day on which this defendant was, as hereinbefore alleged, adjudged a bankrupt; and said claims and demands were proveable and were proved against the estate of this defendant, in the proceedings in the United States District Court in which said discharge was granted. 55

(10.) That the debts, claims and demands alleged in the complaint in said action by Henry P. Wakelee against this defendant, in the said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, were not, nor was any part thereof created by the fraud or embezzlement of this defendant's defalcation as a public officer, or while this defendant was acting in any other fiduciary character. 56

(11.) That the said judgment of November 18, 1873, obtained by Henry P. Wakelee against this defendant in said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco is, in law, the same debt and claim or demand as the debts, claims or demands set forth in the complaint in said action which resulted in said judgment. 57

(12.) That the discharge granted to this defendant as aforesaid on March 6, 1877, did forever bar and discharge the debts, claims and demands alleged in the complaint in the said action by Henry P. Wakelee against this defendant in the said District Court of the Fifteenth Judicial District of the State of Califor-

58 nia in and for the City and County of San Francisco, and interest thereon, and also did forever bar and discharge the said judgment obtained by Henry P. Wakelee against this defendant in said action on November 18, 1873, and interest thereon.

(13.) That said Henry P. Wakelee continued to own said promissory notes, and the indebtedness, if any, represented by them, and also continued to own said judgment of November 18, 1873, until the month of February, 1881, when, as this defendant is informed and believes, said Henry P. Wakelee sold and assigned the said judgment of November 18, 1873, to one Charles E. Laidlaw, who, as this de-
59 fendant is informed and believes, subsequently and on or about November 9, 1886, sold and assigned the said judgment to the plaintiff in this action who is still the owner thereof, and therefore this defendant alleges that the rights of this plaintiff are no greater than would be the rights of said Henry P. Wakelee were he alive; and said discharge in bankrupty granted to this defendant on March 6, 1877, did, and does, as against this plaintiff, forever bar and discharge the debts, claims and demands alleged in the complaint in the action by Henry P. Wakelee against this defendant in the said District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco, and interest thereon, and also did and
60 does forever bar and discharge the said judgment in said action of November 18, 1873, and interest thereon.

IV.—He denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs VII., IX., X. and XII. of the complaint herein.

V.—While this defendant does not deny that the judgment referred to in paragraph XI. of the complaint, if ever given, made or entered. was "duly"

given, made or entered, yet he denies any knowledge or information sufficient to form a belief as to whether the judgment therein referred to was ever given, made or entered by the District Court therein referred to. 61

VI.—He denies, as alleged in paragraph XIII. of the complaint, that the whole amount of the judgment therein referred to still remains due and owing, and he denies that any amount is due and owing from this defendant to the plaintiff.

VII.—For a further and separate defense to the second cause of action set forth in the amended complaint, this defendant realleges with the same force and effect as if herein set forth in detail each and all of the allegations hereinbefore set forth as a further and separate defense to the first cause of action stated in the amended complaint. 62

VIII.—He denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs XVI., XVIII., XIX., XX. and XXI. of the complaint herein.

IX.—This defendant denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraph XVII. of the complaint, except the allegation contained in the words, "Which said judgment still stands of record in said District Court and is in full force." 63

X.—While this defendant does not deny that the judgment referred to in paragraph XXIII. of the complaint, if ever given, made or entered, was "duly" given, made or entered, yet he denies any knowledge or information sufficient to form a belief as to whether the judgment therein referred to was ever given, made or entered by the District Court therein referred to, or any Court.

64 XI.—He denies, as alleged in paragraph XXII. of the complaint, that the whole amount of the judgment therein referred to still remains due and owing, and he denies that any amount is due and owing from this defendant to the plaintiff.

XII.—For a further and separate defense to the third cause of action set forth in the amended complaint, this defendant realleges with the same force and effect as if herein set forth in detail each and all of the allegations hereinbefore set forth as a further and separate defense to the first cause of action stated in the amended complaint.

65 XIII.—He denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs XXIV., XXVI., XXVIII., XXIX., XXX. and XXXI. of the complaint herein.

XIV.—This defendant denies any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph XXVII. of the complaint, except the allegation contained in the words, "Which said judgment still stands of record in said District Court and is in full force."

66 XV.—While this defendant does not deny that the judgment referred to in paragraph XXXV. of the complaint, if ever given, made or entered, was "duly" given, made or entered, yet he denies any knowledge or information sufficient to form a belief as to whether the judgment therein referred to was ever given, made or entered by the District Court therein referred to, or by any other court.

XVI.—He denies, as alleged in paragraph XXXII. of the complaint, that the whole amount of the judgment therein referred to still remains due and owing, and he denies that any amount is due and owing from this defendant to the plaintiff.

XVII.—For a further and separate defense to the fourth cause of action set forth in the amended complaint, this defendant realleges, with the same force and effect as if herein set forth in detail, each and all of the allegations hereinbefore set forth as a further and separate defense to the first cause of action stated in the amended complaint. 67

Wherefore, this defendant demands judgment against the plaintiff, dismissing the amended complaint herein, with costs and disbursements in this action.

KENYESON, CRAIN & ALLING,
Attorneys for Defendants.
Office and Post Office address,
35 Wall Street,
N. Y. City. 68

SOUTHERN DISTRICT OF NEW YORK, }
State of New York, } ss.:
City and County of New York, }

ERWIN DAVIS, being duly sworn, says: That he is the defendant in this action; that he has read the foregoing amended answer to the amended complaint herein, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. 69

ERWIN DAVIS.

Sworn to before me this 3d }
day of August, 1892. }

PETER L. JONES,
Commr. of Deeds,
City and Co. of N. Y.

70 **Exhibit A.**

CERTIFICATE OF FINAL DISCHARGE IN BANKRUPTCY.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CALIFORNIA.

In Bankruptcy.

IN THE MATTER

71 OF

ERWIN DAVIS, Voluntary Bankrupt.

District of California, ss.:

Whereas Erwin Davis, of San Francisco, in the County of San Francisco and State of California, has been by this Court duly adjudged a bankrupt under the Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and appears to have conformed to all the requirements of
72 the law in that behalf,

It is therefore ordered by the Court, that said Erwin Davis be, and he hereby is forever discharged of and from all debts and claims which by said Act are made probable against his estate, and which existed on the 11th day of September, A.D. 1869, on which day the petition for adjudication was filed by Erwin Davis, excepting such debts, if any, as are by said Act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the said District Court at San Francisco, in said District, this

the sixth day of March, A. D. one thousand eight 73
hundred and seventy-seven.

[SEAL.] OGDEN HOFFMAN,
Judge of the District Court, U.S.,
for the District of California.

I, Southard Hoffman, Clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the certificate of final discharge in bankruptcy of Erwin Davis, in file and of record in my office.

Attest my hand and seal of said District Court this 7th day of March, 1877.

SOUTHARD HOFFMAN, 74
[SEAL.] Clerk.

(Endorsed)--U. S. Circuit Court, Southern District of N. Y.—Angelica Wakelee, plff., against Erwin Davis, deft.—(origl.)—Second amended answer.—Kennson, Crain & Alling, attorneys for defendant.—Office and post office address, 35 Wall street, New York City.—U. S. Circuit Court.—Filed Aug. 14, 1892.—John A. Shields, Clerk.

75

76 At a Stated Term of the Circuit Court of the United States, Second Circuit, held in and for the Southern District of New York, at the United States Circuit Court Room, in the City of New York, on the 20th day of October, 1892.

Present--Hon. NATHANIEL SHIPMAN, *Judge*.

ANGELICA WAKELEE,
Plaintiff,

vs.

77

ERWIN DAVIS,
Defendant.

Now comes the plaintiff, by Anson Maltby, her attorney, and moves the trial in this case.

Likewise comes the defendant, by Messrs. Kenneson, Crain & Alling, his attorneys.

Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence of the parties and the argument of counsel on the nineteenth and twentieth days of October, 1892, the Court directs the jury to
78 find a verdict for the plaintiff, Angelica Wakelee, against the defendant, Erwin Davis, in the sum of fifty thousand one hundred dollars and fifty-three cents ($50,100.53).

The jury render a verdict whereby they find for the plaintiff and against the defendant in said sum.

It is ordered that forty-five days' stay be allowed in which defendant may file and serve his bill of exceptions.

An extract from the minutes.

JOHN A. SHIELDS,
Clerk.

H. H. M.

CIRCUIT COURT OF THE UNITED STATES 79

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE,
Plaintiff,

vs.

ERWIN DAVIS,
Defendant.

Law Action.
No. 2197.

80

We hereby consent that Messrs. Logan, Clark & Demond be substituted in our place and stead as attorneys for the defendant herein, Erwin Davis.

Dated New York, November 28, 1892.

KENNESON, CRAIN & ALLING,
Attys. for Defendant.

(Endorsed)—U. S. Circuit Court, So. District of New York.—Angelica Wakelee *vs.* Erwin Davis.—Consent for substitution of attorneys for Defendant.—Logan, Clark & Demond, Substituted Attys. for Deft., 58 William St., New York.—U. S. Circuit Court.—Filed Nov. 29, 1892.—John A. Shields, Clerk. 81

82 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE AGAINST ERWIN DAVIS.	Law Action No. 2197.

On reading and filing the consent of the attorneys
83 for the defendant herein, and on motion of Logan, Clark & Demond, it is

Ordered, that Logan, Clark & Demond be and they hereby are substituted for and in the place of Kenneson, Crain & Alling, as attorneys for the defendant herein.

November 29, 1892.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

84 ANGELICA WAKELEE, Plaintiff, AGAINST ERWIN DAVIS, Defendant.	

This action having come on to be tried in its regular order on the calendar, before the Honorable Nathaniel Shipman, Judge, and a jury, at a Stated Term of the

Circuit Court of the United States of America for the 85
Southern District of New York in the Second Circuit, at the United States Circuit Court Room, in the City of New York, on the 19th and 20th days of October, 1892; and the counsel for the plaintiff having moved that a verdict be directed in favor of the plaintiff upon the pleadings herein and upon the evidence produced upon the trial; and the jury having found a verdict for the plaintiff and against the defendant, under direction of the Court, in the sum of fifty-thousand one hundred dollars and fifty-three cents ($50,100.53), and the costs of the plaintiff having been duly taxed, on notice, at the sum of fifty-seven and $\frac{23}{100}$ ($57.23) dollars;

Now, on motion of Anson Maltby, Esquire, attor- 86
ney for the plaintiff, it is adjudged, that said plaintiff, Angelica Wakelee, have judgment upon the merits against the defendant, Erwin Davis, in the sum of fifty thousand seven hundred and thirty-five and $\frac{13}{100}$ ($50,735.13) dollars, being the amount of said verdict and interest thereon to this day, and that said plaintiff recover of Erwin Davis, the defendant, the sum above named, together with the sum of fifty-seven $\frac{23}{100}$ ($57.23) dollars, her costs as adjusted, amounting together to the sum of fifty thousand seven hundred and ninety-two and $\frac{36}{100}$ ($50,792.36) dollars, and that she have execution therefor.

Judgment signed this 5th day of January, 1893. 87

JOHN A. SHIELDS,
Clerk.

(Endorsed)—U. S. Circuit Court, So. Dist. of New York.—Angelica Wakelee, Plaintiff, against Erwin Davis, Defendant.—Judgment Roll.—Anson Maltby, Attorney for Plaintiff, 48 Wall Street, New York City.—U. S. Circuit Court.—Filed Jan. 5, 1893.—John A. Shields, Clerk.

88 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE

AGAINST

ERWIN DAVIS.

BILL OF EXCEPTIONS.

89 Be it remembered that afterward, to wit, on the 19th and 20th days of October, in the year of our Lord one thousand eight hundred and ninety-two, at a Stated Term of said Court, begun and held in New York City, in and for the Southern District of New York, before his honor, Nathaniel Shipman, Circuit Judge, duly assigned to hold said Court, the issue joined in the above stated cause between the said parties, under the pleadings herein, came on to be tried before the said Judge and a jury, the plaintiff being represented by Anson Maltby, Esq., her attorney, and the defendant being represented by Thaddeus D. Kenneson, Esq., his attorney. And upon the trial of that issue the attorney for the said plaintiff, to maintain and prove the said issue on
90 her part, offered the following evidence, and the following proceedings were had:

At the beginning of said trial, Mr. Kenneson, the defendant's attorney, moved the Court that the plaintiff be compelled to elect on which of the four counts in the complaints she would go to trial. Whereupon the plaintiff's attorney objected, and the said judge did then and there sustain said objection. Whereupon the attorney for the defendant did then and there except.

Thereupon the plaintiff's attorney opened the case to the jury.

Thereupon the plaintiff's attorney stated as follows: 91

"I offer in evidence an exemplified copy of a judgment of the Fifteenth Judicial District Court of California obtained in an action in which Henry P. Wakelee was plaintiff and Erwin Davis was defendant, and entered November 18, 1873."

Whereupon the defendant's attorney made the following objections, in the following language: "I object on the ground that the only proper evidence would be the judgment roll, and the further objection that the judgment on its face shows that it was a judgment of the Fifteenth Judicial District of the State of California, and the certification is by a certificate of the Clerk of the Superior Court of 92 San Francisco, and is not such an exemplification as is required by the statute." Thereupon the said judge inquired of the plaintiff's attorney whether he had the entire judgment roll, and receiving an affirmative answer, the said judge stated: "I think you had better offer it." Whereupon the plaintiff's attorney made the following offer: "Then I offer the entire judgment roll."

Upon said offer the defendant's attorney made the following objection: "The papers here offered contain more than the roll. They are a transcript of a record on appeal. I object to anything more than the record in the lower Court, and I make the same objection as before, that the record of itself 93 shows, on its face, that it is not certified by a clerk of the Court in which the judgment was entered, and therefore is not properly certified."

Thereupon the said judge admitted said roll in evidence. Whereupon the defendant's attorney, then and there, took an exception. The judgment roll so admitted reads as follows:

94 IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA.

HENRY P. WAKELEE,
Plaintiff and Appellant,

vs.

ERWIN DAVIS,
Defendant and Respondent.

95 TRANSCRIPT ON APPEAL FROM THE FIFTEENTH DISTRICT COURT.

W. H. L. BARNES, Attorney for Appellant.
C. DORSEY, Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

COMPLAINT.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

96 HENRY P. WAKELEE,
Plaintiff,

vs.

ERWIN DAVIS,
Defendant.

The complaint of Henry P. Wakelee, plaintiff in this action, against Erwin Davis, defendant herein, respectfully shows to the Court and alleges as follows:

FIRST.—That on or about the twenty-sixth day of 97
August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in handwriting, in the words and figures following, that is to say:

"SAN FRANCISCO, August 26, 1869.

"$1,804.65.

"On the 25th day of September, 1869, at three o'clock P. M. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, eighteen hundred and four $\frac{65}{100}$ dollars, with interest from 98
date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been, and now is, the owner and holder thereof.

That no part thereof, or of the interest due thereon, has been paid.

And for a further and separate cause of action against said defendant, the plaintiff alleges and shows to the Court, as follows:

99

That on or about the twenty-sixth day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing, in the words and figures following, that is to say:

"SAN FRANCISCO, August 26, 1869.

"$1,965.

"On the 25th day of October, 1869, at 3 o'clock P. M., of that day (no grace), for value received, in gold coin of the Government of the United States, I

promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due, at the rate of per cent. per month until paid, payable monthly, both principal and interest payable in like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof, or of the interest thereon, has been paid.

And, for a further and separate cause of action against the defendant, the plaintiff alleges and shows to the Court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following, that is to say:

SAN FRANCISCO, August 26, 1869.

"$1,965.

"On the 24th day of November, 1869, at three o'clock P. M. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who there-

by became and ever since has been and now is the 103
owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against the defendant the plaintiff alleges and shows to the Court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

SAN FRANCISCO, August 26, 1869. 104

"$1,965.

"On the 24th day of December, 1869, at three o'clock P. M. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakeley, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now 105
is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the Court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the City and County of San Francisco, State of California, said defendant, Irwin Davis, made his certain promissory note, in writing, in the words and figures following, that is to say:

106 SAN FRANCISCO, August 26, 1869.

"$1,965.

"On the 23rd day of January, 1870, at three o'clock P. M. of the day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered
107 the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the Court as follows:

That on or about the eighth day of September, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing, in the words and figures following, that is to say:

"SAN FRANCISCO, September 8, 1869.

108 "On demand I promise to pay to H. P. Wakelee or order six thousand and fifty-five $\frac{35}{100}$ dollars in gold coin, with interest from date at the rate of one per cent. a month.

"$6,055.35.

"(Signed) ERWIN DAVIS.

(U. S. Internal Revenue stamps, $3.05.)

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon 109
has been paid.

Wherefore the plaintiff demands judgment against the said defendant for the sum of fifteen thousand seven hundred and twenty dollars, and with interest on $1,804.65, parcel thereof, from August 26, 1869, at the rate of one per cent. per month; and with interest on $1,965, parcel thereof, from October 25, 1869, at the rate of ten per cent. per annum; and with interest on $1,965, parcel thereof, from November 24, 1869, at the same rate; and with interest on $1,965, parcel thereof, from December 24, 1869, at the same rate; and with interest on $1,965, parcel thereof, from January 23, 1870, at the same rate; and with interest on $6,055.35, parcel thereof, from September 8, 110
1869, at the rate of one per cent. per month; that the same be decreed and ordered to be paid in gold coin of the United States, and that plaintiff may recover his costs and disbursements in this action.

WM. H. L. BARNES,
Plaintiff's Attorney.

City and County of San Francisco, ss.:

HENRY P. WAKELEE, being duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the 111
matters which are therein stated on information and belief, and as to those matters he believes it to be true.

H. P. WAKELEE.

Subscribed and sworn to before me this 19th day of July, A. D. 1873.

F. O. WEGENER,
[SEAL] Notary Public.

(Endorsed)—Filed July 19, 1873.

112 (Title of Court and Cause.)

SUMMONS.

The People of the State of California send greeting to Erwin Davis, Defendant:

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Fifteenth Judicial District of the State of California, in and for the County of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within the county, or, if served out of this
113 county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover in gold coin of the United States the sum of $15,720, with interest thereon, alleged to be due to plaintiff from defendant upon and by reason of said defendant's six promissory notes delivered to said plaintiff, as particularly set forth in the complaint on file herein, besides costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will take judgment against
114 you in gold coin for said sum of $15,720, with interest and costs as aforesaid.

Given under my hand and seal of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL

WILLIAM HARNEY,
Clerk.
By H. W. KIND,
Deputy Clerk.

(Endorsed)—Filed August 1, 1873.

(Title of Court and Cause.) 115

AFFIDAVIT FOR PUBLICATION OF SUMMONS.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.:

HENRY P. WAKELEE, being duly sworn, says: That he is the plaintiff in the above entitled action; that the complaint in said action was filed with the Clerk of said Court on the 19th day of July, 1873, and summons thereupon issued; that said action is brought to recover the sum of $15,720, due and unpaid by said defendant Erwin Davis to the plaintiff upon six promissory notes made by said defendant and dated at the City of San Francisco on the 116
26th day of August, A. D. 1869, and the 8th day of September, 1869, as hereinafter expressed, and payable to the plaintiff or his order, with interest, until paid, as follows—that is to say:

Dated August 26, one due September 25, 1869, with interest from August 26, 1869	$1,804 65
Dated August 26, one due October 25, 1869, with interest from that date, for	1,965 00
Dated August 26, one due November 24, 1869, with interest from that date, for	1,965 00
Dated August 26, one due December 24, 1869, with interest from that date, for	1,965 00
Dated August 26, one due January 23, 1870, with interest from that date, for	1,965 00
Dated September 8, one payable on demand, with interest from September 8, 1869, for	6,055 35
Together	$15,720 00

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118 That this deponent has been informed and believes, and therefore alleges, the said defendant Erwin Davis resides out of the State of California, to wit, in the City and County and State of New-York.

Wherefore defendant prays this honorable Court for an order that the service of the summons in this action may be made by publication thereof.

H. P. WAKELEE.

Subscribed and sworn to this 19th day of July, A. D. 1869, before me.

[SEAL.] F. G. WEGENER,
Notary Public.

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Endorsed—Filed July 26, 1873.

(Title of Court and Cause.)

ORDER FOR PUBLICATION OF SUMMONS.

Upon reading and filing the affidavit of the plaintiff and the complaint herein, and it satisfactorily appearing therefrom to me, the Judge of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County
120 of San Francisco, that the defendant Erwin Davis resides out of the State, and cannot, after due diligence, be found therein, and it appearing from the affidavit aforesaid and the complaint herein that a good cause of action exists in this action in favor of the plaintiff therein and against the said defendant, and that the said defendant is a necessary and proper party defendant thereto; and it further appearing that a summons has been duly issued out of said Court in this action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained and by the said affidavit made to appear, on motion of William

H. L. Barnes, Esq., attorney for the plaintiff, it is 121
ordered that the service of the summons in this action be made upon the defendant by publication thereof in the *Daily Evening Bulletin*, a newspaper published at said City and County of San Francisco, hereby designated as the newspaper most likely to give notice to said defendant; that such publication be made at least once a week for two months.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at the City of New York, in the County of New York, in the State of New York, it is ordered that a copy of the summons and a certified copy of the complaint in this suit be forthwith deposited in the Post Office, postpaid, directed to said 122
defendant at his said place of residence.

Dated San Francisco, July 28, A. D. 1873.

SAMUEL H. DWINELLE,
Judge of the District of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

(Endorsed) – Filed July 30, 1873.

123

(Title of Court and Cause.)

PROOF OF DEPOSIT.

City and County of San Francisco, } ss.:
STATE OF CALIFORNIA, }

WILLIAM O'CONNELL, of the City and County of San Francisco, being duly sworn, deposes and says: That he is a white male citizen of the United States, over twenty-one years of age, and is competent to be a witness on the trial of the action in the above entitled suit; that on the thirtieth day of July,

124 one thousand eight hundred and seventy-three, deponent deposited in the Post Office of the City and County of San Francisco, in a sealed envelope, a copy of the summons and a certified copy of the complaint in this case, directed to the defendant Erwin Davis, City, County and State of New York, having prepaid the legal postage thereon.

WILLIAM O'CONNELL.

Subscribed and sworn to before me this thirty-first day of July, A. D. 1873.

F. J. THIBAULT,
Notary Public.

[SEAL.]

125 (Endorsed)—Filed July 31, 1873.

(Title of Court and Cause.)

AFFIDAVIT OF PUBLICATION.

SAN FRANCISCO, November 11, 1873.

STATE OF CALIFORNIA, City and County of San Francisco, } ss.:

A. C. BONNELL, of the said city and county, being duly sworn, says: That he is a white citizen of the United States; that he is over twenty-one years of
126 age and is competent to be a witness on the hearing of the matters mentioned in the annexed summons; that he has no interest whatsoever in the case mentioned therein, and that he is the principal clerk of the printers and publishers of the *Daily Evening Bulletin*, a newspaper which is published daily (Sundays and holidays excepted) in said city and county, and has charge of all the advertisements in said newspaper, and that the summons in the case of Henry P. Wakelee, plaintiff, *vs.* Erwin Davis, defendant, of which summons the following is a printed copy:

"In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco. 127

"HENRY P. WAKELEE,
"Plaintiff,

"vs.

"ERWIN DAVIS,
"Defendant.

"Action brought in the District Court of the Judicial District of the State of California, in and for the City and County of San Francisco, and the complaint filed in said City and County of San Francisco, in the office of the Clerk of said District Court. 128

"The People of the State of California send greeting to Erwin Davis, defendant:

"You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint. 129

"The said action is brought to recover, in gold coin of the United States, the sum of $15,720, with interest thereon, alleged to be due to plaintiff from defendant upon and by reason of said defendant's six promissory notes delivered to said plaintiff, as particularly set forth in the complaint on file herein, besides costs of suit.

130 "And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you in gold coin for said sum of $15,720, with interest and costs as aforesaid.

"Given under my hand and seal of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] "WILLIAM HARNEY,
"Clerk.
"By H. W. KIND,
131 "Deputy Clerk.

"W. H. L. BARNES,
"Attorney for Plaintiff."

Has been published every Wednesday for two successive months in the above-named newspaper, commencing (first insertion) Wednesday, July 30, 1873, and ending (last insertion) Wednesday, October 1, 1873 (ten insertions); and further sayeth not.

A. C. BONNELL.

Subscribed and sworn to this 11th day of November, 1873, before me—

[SEAL.] SAMUELS MURFEY,
132 Notary Public.

(Endorsed)—Filed Nov. 11, 1873.

CERTIFICATE OF SECRETARY OF STATE.

STATE OF CALIFORNIA, DEPARTMENT OF STATE.

SACRAMENTO, Aug. 8, 1873.

I, DRURY MELONE, Secretary of the State of California, do hereby certify that on the 8th day of August, 1873, there was received and filed in this

office and duly entered and indexed in the "Register of Absent Defendants" a duly certified copy of the order of publication of summons; also a copy of the summons and a copy of the newspaper containing the publication thereof in the case of H. P. Wakelee *vs.* Erwin Davis, in the District Court of the Fifteenth Judicial District, held in and for the County of San Francisco, State of California, and that the following is the name of the defendant as to whom publication of summons was directed to be made: Erwin Davis 133

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 8th day of August, 1873.

[SEAL.] DRURY MELONE, 134
Secretary of State.
H. H. RUSSELL,
Deputy.

(Endorsed)—Filed August 18, 1873.

(Title of Court and Cause).

JUDGMENT.

In this cause, on motion of Wm. H. L. Barnes, Esquire, of counsel for plaintiff, and upon due proof of the service upon the defendant of the process issued herein that the time for answering has expired, and that the said defendant has failed to appear, answer or demur— 135

Ordered that the default of the defendant for failure to answer be and the same is hereby entered.

Whereupon James H. Dane was sworn and examined as a witness on behalf of plaintiff, and the Court orders that judgment be drawn and entered herein in favor of plaintiff and against defendant for the sum of $22,760.26 in United States gold coin.

Wherefore, by virtue of law and by reason of the

136 premises aforesaid, it is ordered, adjudged and decreed that H. P. Wakelee, plaintiff, have and recover from Erwin Davis, defendant, in the United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon from the date hereof at the rate of seven per cent. per annum till paid, together with plaintiff's costs and disbursements incurred herein, amounting to the sum of forty-nine ($49) dollars.

Judgment recorded November 18, A.D. 1873. "C," 727.

Judgment-roll, comprising and consisting of the whole of the foregoing, filed November 18, 1873.

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(Title of Court and Cause.)

NOTICE OF MOTION TO VACATE JUDGMENT.

To H. P. WAKELEE and his Attorney:

Take notice that the defendant in this action will, on Friday, the 13th day of April, A.D. 1877, at the opening of the Court on that day, make a motion in open Court to vacate and set aside the judgment of this Court heretofore rendered in this action on the 13th day of November, A.D. 1873, for twenty-two thousand seven hundred and sixty-nine dollars, with forty-nine dollars costs, entered and recorded
138 in Judgment Book C, page 727, and to permit the defendant in this action to plead his discharge in bankruptcy in bar of the original debt on which this action was founded.

Defendant will also make a motion for a perpetual injunction and stay of execution in this action.

These motions will be made in the court room of said Court at the time hereinbefore stated, or as soon thereafter as counsel can be heard, on the following grounds:

1st. That the judgment is null and void for the reason that the service of summons was by publica-

tion, and that the affidavit of plaintiff for publication was insufficient to warrant the issuance of the order for the publication of the summons or to sustain the judgment. 139

2d. That the judgment is void for the further reason that prior to the commencement of this action the defendant was bankrupt, and on or about the 11th day of September, A.D. 1869, he filed his petition in the District Court of the United States for the District of California, in the City of San Francisco and State of California, for the benefit of the bankrupt laws of the United States, and was, on or about the 30th day of September, A.D. 1869, duly adjudged a bankrupt. 140

That after the adjudication of bankruptcy of defendant plaintiff in this action made proof of his debt against the defendant and filed said proof of debt in the United States District Court or with the register thereof; that by the proving of the debt in the bankruptcy proceeding the plaintiff waived all right of action against defendant; that after filing said proof of debt plaintiff commenced this action and obtained this judgment while said proceedings were still pending, and that this Court had no jurisdiction of the subject matter of the action nor of the person of the defendant during the pendency of the proceedings in bankruptcy.

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3d. That the defendant, on or about the 6th day of March, A. D. 1877, was duly discharged from all his debts which were proven or which were provable in bankruptcy, and that his discharge is a bar to both the original debt and the judgment in this action.

4th. That the plaintiff has commenced suit against the defendant in France on the judgment in this action, and is endeavoring to enforce it against property acquired since his adjudication in bankruptcy.

142 These motions will also be made on the affidavit of Caleb Dorsey, a copy of which will be served with this notice of motion.

CALEB DORSEY.
Atty. for Erwin Davis.

(Endorsed)—Filed April 12, 1877.

(Title of Court and Cause).

AFFIDAVIT OF CALEB DORSEY, ATTORNEY FOR DEFENDANT.

143 (Accompanying the preceding Notice).

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.:

CALEB DORSEY, being duly sworn, deposes and says: That he is the attorney of Erwin Davis, the defendant in this action, and that he, the said Davis, is at present absent from the State of California and is in the State of New York.

Affiant further states that the complaint in this action was filed on or about the 19th day of July, A. D. 1873.

That there was no personal service of summons on
144 the defendant.

That service of summons was made by publication of the summons, and that a copy of the affidavit of plaintiff for the order of publication of summons is hereto attached and made a part of this affidavit, and that judgment was rendered by default on or about the 13th day of November, A. D. 1873, for the sum of $22,760.26, gold coin, with $49 costs of suit, entered and recorded in Judgment Book C, page 727.

Affiant further states that on or about the 11th day of September, A. D. 1869, and prior to the commencement of said suit, the said Erwin Davis became bankrupt and filed his petition for the benefit

of the bankrupt laws of the United States in the 145
District Court of the United States for the District of California, in the City of San Francisco in the State of California, and was duly adjudged a bankrupt on or about the 30th day of September, A. D. 1869.

That after said adjudication of bankruptcy, and long prior to the commencement of this action, plaintiff made proof of his debt against said defendant and filed said proof of debt in said United States District Court or with the register thereof.

Affiant further states that prior to the commencement of said suit, the United States District Court gave permission to plaintiff to bring said action pending the proceedings of bankruptcy and before 146
said proceedings had ended without a discharge and before the discharge had been refused, and that said proceedings in bankruptcy have since ended by the said Court granting to said defendant a full and complete discharge of all his debts, proven and provable, in bankruptcy, and that said discharge was granted on or about the day of , 1877.

Affiant further states that said plaintiff, as he has been informed and believes, has commenced suit in France on said judgment, and is now endeavoring to enforce it against property acquired since the adjudication of bankruptcy.

The affiant has obtained this information from said Erwin Davis, and also from W. H. L. Barnes, 147
the attorney of plaintiff; that he has heard both of them state that such suit has been commenced, and that this affiant believes that said suit is still undetermined and pending.

Affiant further states that at the time and long prior to the filing of his petition in bankruptcy the said Erwin Davis was a resident of the State of California.

CALEB DORSEY.

Subscribed and sworn to before me this 9th day of April, 1877.

SAMUEL S. MURFEY,
[SEAL.] Notary Public.

148 (Title of Court and Cause.)

AFFIDAVIT FOR PUBLICATION OF SUMMONS.

(Accompanying the preceding Notice.)

STATE OF CALIFORNIA, } ss.:
City and County of San Francisco, }

HENRY P. WAKELEE, being duly sworn, says: That he is the plaintiff in the above entitled action; that the complaint in said action was filed with the Clerk of said Court on the nineteenth (19th) day of July, 1873, and summons thereupon issued; that said action is brought to recover the sum of $15,720, due and unpaid by said defendant, Erwin Davis, to the
149 plaintiff upon six promissory notes made by said defendant, and dated at the City of San Francisco on the 20th day of August, A. D. 1869, and on the 8th day of September, 1869, as hereinafter expressed, and payable to the plaintiff or his order, with interest until paid, as follows, that is to say:

Dated August 26th, one due September 25, 1869, with interest from August 26, 1869, for	$1,804 65
Dated August 26th, one due October 25, 1869, with interest from that date, for	1,965 00
Dated August 26th, one due November
150 24, 1869, with interest from that date, for	1,965 00
Dated August 26th, one due December 24, 1869, with interest from that date, for	1,965 00
Dated August 26th, one due January 23, 1870, with interest from that date, for	1,965 00
Dated September 8th, one payable on demand, with interest from September 8, 1869, for	6,055 35
Together	$15,720 00

That this deponent has been informed and be- 151
lies and therefore alleges, the said defendant, Erwin Davis, resides out of the State of California, to wit, in the City and County of the State of New York.

Therefore, deponent prays this Honorable Court for an order that the service of the summons in this action may be made by publication thereof.

H. P. WAKELEE.

Subscribed and sworn to before me this 19th day of July, A. D. 1873.

F. O. WEGENER,
Notary Public.

(Endorsed)—Filed July 28, 1873. 152

All objections as to time of service being waived, service of copy of the foregoing notice of motion and affidavit admitted this 11th day of April, 1877.

W. H. L. BARNES,
Atty. for Plff.

(Title of Court and Cause.)

OPINION OF THE COURT.

The defendant moves to set aside the judgment 153
entered in this action, and that he be permitted to plead his discharge in bankruptcy in bar of the original debt on which this action was brought, and also for a perpetual injunction and stay of execution.

Erwin Davis, the defendant in this action, being a bankrupt, on the 11th day of September, 1869, filed his petition for the benefit of the bankrupt laws of the United States in the District Court of the United States for the District of California, and was, on the 30th day of September, 1869, adjudicated a bankrupt. Prior to the 19th day of July, 1873, the said United States District Court gave the said plaintiff

154 permission to bring this action, and the same was commenced on the day and the year last aforesaid. There was not any personal service of summons therein on the said defendant, but service thereof was made by publication, and on the 13th day of November, 1873, judgment was rendered by default against the said defendant for the sum of $22,760.26 damages, payable in gold coin, and $49 costs. After the said adjudication of bankruptcy, and long prior to the commencement of this action, the said plaintiff made proof of the indebtedness sued upon in this action in the said United States District Court, or with the register thereof.

The proceedings in bankruptcy in the United States
155 District Court have ended and culminated on the 6th day of March, 1877, by the granting therein to the said defendant a full and complete discharge of all his debts, proven and provable, in bankruptcy.

"A discharge in insolvency of a debt is equally a discharge of a judgment on that debt and the costs rendered between the time of filing the petition and schedule and the time of final discharge."

"The judgment is simply the original debt in a new form."

"Relief in such a case may also be granted by a perpetual stay of execution, or by setting it aside, or by any other requisite to protect the rights of the parties."

156 "The remedy at law being ample, equity will not aid."

Imlay *vs.* Carpenter, 14 Cal., 173.

Applying the principles of the case cited to the motion under consideration, the defendant is entitled to an opportunity to avail himself of the defense he has shown *prima facie* himself to have to the judgment and the cause of action on which it was predicated. The motion is in time, as good cause is shown why the motion was not made before the adjournment of the term in which the judgment was entered; the motion could not be made at that

term, for the foundation of it, the final discharge in 157
bankruptcy, was not granted until March last.

Mahoney *vs.* Mahoney, 51 Cal., 118.

I do not deem it necessary to examine the other points made by the defendant. I have been referred by counsel for the plaintiff to the case of McDonald *vs.* Davis, recently decided by the Supreme Court. It was not a case parallel with the one under consideration. In that case a final discharge in bankruptcy had not been granted, and, as I understand, was decided from the bench upon the one point that that tribunal would not review the action of the United States District Court in granting an order permitting a creditor of a bankrupt to commence an
action to recover his claim. 158

The defendant's motion is granted to the extent of setting aside and vacating the judgment and permitting him to plead his discharge in bankruptcy.

DWINELLE,
Judge.

(Endorsed)—Filed July 10, 1877.

(Title of Court and Cause.)

ORDER TO VACATE JUDGMENT.

The defendant's motion to vacate and set aside the judgment heretofore rendered and entered herein having heretofore been heard, submitted and taken 159
under advisement, and now due consideration having been had--

It is ordered that said motion be, and the same is hereby granted and allowed to the extent of vacating and setting aside said judgment and allowing defendant to plead his final discharge in bankruptcy; to which ruling and decision of the Court plaintiff, by his attorney, at the time excepted.

DWINELLE,
Judge.

160 Tuesday, July 10, 1877.

(Title of Court and Cause.)

NOTICE OF APPEAL.

You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of this State from the order vacating the judgment therein made and entered in the said District Court on the 10th day of July, 1887, in favor of the defendant in said action and against said plaintiff, and from the whole thereof.

Dated this 30th day of August, 1877.

Yours, &c.,

W. H. L. BARNES,

Atty. for Plaintiff and Appellant.

161 TO THE CLERK OF SAID DISTRICT COURT, and

CALEB DORSEY, Esq.,

Atty. for Defendant.

(Endorsed)—Filed August 30, 1877.—Received a copy of the within this 30th day of August, 1877.—Caleb Dorsey, Atty. for Defendant.—Service accepted by copy this day of 187 .— Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

DEPARTMENT TWO.

162

HENRY P. WAKELEE, Plaintiff and Appellant, vs. ERWIN DAVIS, Defendant and Respondent.	February 5, 1881.

DEPARTMENT TWO.

(Filed February 5, 1881.)

By the Court.

WAKELEE vs. DAVIS. } No. 5817.

This is an appeal from an order made July 10, 1877, granting defendant's motion to the extent of

vacating and setting aside a judgment against him and allowing him to plead his final discharge in bankruptcy. The judgment was recorded November 18, 1873, and the notice of the motion was given April 12, 1877. On the authority of Bell *vs.* Thompson, 19 Cal., 706; Casement *vs.* Ringgold, 28 Cal., 335; Sanchez *vs.* Carriaga, 31 Cal., 170, and Murdock *vs.* De Vries, 37 Cal., 527, the order is reversed. 162a

I, FRANK W. GROSS, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion delivered in the above entitled cause on the 5th day of February, A. D. 1881, and now on file in my office. 162b

Witness my hand and the seal of the Court this 17th day of February, A. D. 1881.

FRANK W. GROSS,
Clerk.

Seal of Supreme Court of California.

By C. HARLAN,
Deputy Clerk.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 5817.

DEPARTMENT TWO. 162c

HENRY P. WAKELEE, Appellant, vs. ERWIN DAVIS, Respondent.	On appeal from the District Court from the 15th Judicial District in and for the City and County of San Francisco.

And now, on this day, this cause being called, and having been heretofore submitted and taken under advisement by the Court, and all and singular the law and premises being by the Court here seen, heard, understood and fully considered, the opinion of the Court herein is delivered by the Court.

Whereupon it is now considered ordered, adjudged and decreed by the Court here that the order of the District Court of the Fifteenth Judicial District in

162d and for the City and County of San Francisco, in the above entitled cause, be and the same is hereby reversed, with costs, and that the remittitur herein issue to the Superior Court in and for the City and County of San Francisco.

(Supreme Court seal.) I, FRANK W. GROSS, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of the original judgment entered in the above entitled cause on the 5th day of February, A. D. 1881, and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office this 7th Day of March, A. D. 1881.

162e F. W. GROSS, Clerk.

[SEAL.] By J. B. MARTIN, Deputy.

The foregoing is endorsed.—"15th Dist. Court.—8379, late 15th.—In the Supreme Court, State of California.—Remittitur.—Wakelee *vs.* Davis.—Clerk's costs, $20; paid by appellant, $15; paid by Respt., $5; total, $20.—F. W. Gross, Clerk.—By J. B. Martin, Deputy."

The foregoing Exhibit Transcript, as well as all other exhibits introduced in evidence herein, showing proceedings in the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco, or showing proceedings in the District Court of the United
162f States for the District of California, were duly exemplified, and the various depositions introduced in evidence herein were duly taken and certified to.

After the admission of said exhibit, the defendant's attorney asked the said Judge this question: "Your Honor admits simply the judgment roll, not the transcript on appeal so far as it contains superfluous papers," and the said Judge replied: "I will admit the whole." Whereupon the defendant's attorney, then and there, took his exception to said ruling.

Thereupon the defendant's attorney admitted as a fact, for the purposes of the trial, that the plaintiff was a citizen of the State of California, and that she was the owner of said judgment.

Thereupon one Fielding L. Marshall was duly sworn as a witness in behalf of the plaintiff.

Thereupon the said Judge ruled that interest upon 163
said judgment should be calculated at the rate of seven per cent. until January 1, 1880, and at the rate of six per cent. thereafter. Thereupon the said witness testified as follows:

"I have calculated the interest on this judgment from its date until the first of January, 1880, from the date of the entry of judgment in California, to January first, 1880. The amount is $9,766.16. The amount of interest at 6 per cent., from January first, 1880, until date is $17,521.31. The total amount is $27,287.47.

Thereupon the plaintiff's attorney made the following statement: "The introduction of the judgment roll rather lays it on to me to introduce on the 164
direct what I intended to introduce on the rebuttal. Consequently, I will now offer in evidence the matter constituting the estoppel. I offer to read in evidence the deposition of Southard Hoffman." Thereupon the defendant's attorney objected to the offer and to the deposition upon the ground that evidence of estoppel is immaterial, incompetent and irrelevant. Whereupon the Judge ruled that the deposition should be read, and the defendant's attorney, then and there, noted an exception to such ruling.

Thereupon the plaintiff's attorney read from the said deposition of SOUTHARD HOFFMAN, and all of the deposition as read is hereinafter set forth, and the 165
following proceedings were had upon the reading of such deposition:

The plaintiff's attorney read the following:

"My name is Southard Hoffman; my age is fifty years. I reside in San Francisco, and am by occupation Clerk of the United States District Court for the Northern District of California. I have been such clerk for thirteen years.

Q. 3. Have you examined the records of your office in the matter of bankruptcy of Erwin Davis, with reference to the order filed in that case Octo-

166 ber 31, 1876, with a view to find whether any appeal has been taken from that order?"

Thereupon defendant's attorney, Mr. Kenneson, objected to said question 3 as immaterial, irrelevant, incompetent and inadmissible under the issues in this action. The defendant's attorney further objected to any evidence bearing on the proceedings in bankruptcy. Whereupon the said Judge admitted said testimony, and the defendant's attorney, then and there, noted his exception.

Thereupon said Judge made a ruling that the defendant's attorney should be allowed the same objections and exceptions to all of the questions put to the said Southard Hoffman, without making them
167 separately.

Thereupon the plaintiff's attorney read the answer to said question 3, which was as follows:

"A. I have carefully read every entry in the docket in bankruptcy, in that case, from and after October 31, 1876, and find no such appeal to be entered therein."

Plaintiff's attorney then again read from said deposition:

Q. 4 "Will you now look at the paper shown you, being a paper endorsed '563, United States District Court, in the Matter of Erwin Davis, Bankruptcy,
168 stipulation and agreed statement of facts, filed August 15, 1876, 11.20 A. M., Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' and state whether it came from the records of your office?"

To this question the defendant's attorney, Mr. Kenneson, objected as immaterial, irrelevant and incompetent and inadmissible under the issues, which objection the said Judge overruled, and the defendant's attorney, then and there, noted his exception.

The plaintiff's attorney read the answer to said question 4 as follows:

"That paper came from the files in the case re- 169
ferred to, and I compare the date of filing with the entry in the bankruptcy docket, showing them to be identical, and showing this paper to have been on file."

Mr. Maltby thereupon read the following question in said deposition:

"Q. 5. Will you look at the paper now shown you, endorsed '563, United States District Court, District of California, *in re* Erwin Davis, in bankruptcy. Notes of argument on motion to cancel proofs of debt and to dismiss specifications of opposition of P. B. Cornwall and H. P. Wakelee, filed July 20, 1876, Southard Hoffman, Clerk, by A. D. Grimwood, 170
Deputy Clerk,' and state whether that is on file in your office?"

Thereupon the defendant's attorney, Mr. Kenneson, objected to the said question as immaterial, irrelevant and incompetent and inadmissible under the issues, and the said Judge overruled said objection. Whereupon the defendant's attorney, then and there, noted his exception.

The plaintiff's attorney thereupon read the answer to said question 5, which was as follows:

"Yes, sir."

Thereupon the plaintiff's attorney read the follow- 171
ing question in said deposition:

"Q. 6. When was it so filed in this Matter of Erwin Davis in Bankruptcy?"

Thereupon defendant's counsel objected to said question as irrelevant, immaterial and incompetent and inadmissible under the issues, and the said Judge overruled said objection, and the defendant's counsel, then and there, noted an exception to said ruling.

172 Plaintiff's counsel thereupon read the answer to said question, which was as follows:

"July 20, 1876."

Thereupon the following proceedings were had:

Mr. Maltby: "I offer in evidence the documen- marked Plaintiff's Exhibit Facts. This was used on the motion before the Bankruptcy Court, and contains a statement of the facts. It is an agreed statement of facts, signed by both plaintiff's and defendant's counsel."

Mr. Kenneson: "I object to it as immaterial, irrelevant, incompetent and inadmissible under the pleadings."

173 The Court: Your objection is a general one and a particular one.

Mr. Kenneson: "But I now make my objection to that paper specifically as irrelevant, immaterial and incompetent and inadmissible under the pleadings."

Whereupon the said Judge admitted said paper in evidence, and the defendant's counsel, Mr. Kenneson, then and there noted his exception.

The said paper called Plaintiff's Exhibit Facts, reads as follows:

IN THE DISTRICT COURT OF THE U. S.

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FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER OF ERWIN DAVIS, in Bankruptcy.	)

The following facts are hereby stipulated to be correct and true:

1st. That the petition and schedules of Erwin 175
Davis was filed September 11, 1869.

2d. That he was adjudicated bankrupt by Register Bates, and who has since died, September 30, 1869.

3d. That H. P. Wakelee made proof of debt November, 1869, and amended his proof July 6th, 1870.

4th. That P. B. Cornwall made proof of debt in November, 1869, and amended his proofs July 6, 1870.

5th. That H. P. Wakelee, filed petition to be al- 176
lowed to bring action in State Courts June 28, 1873.

6th. That P. B. Cornwall filed a similar petition July 25, 1872.

7th. That the Court granted the orders asked for in said petitions.

8th. That after said orders were made, the said Wakelee and Cornwall commenced actions against Davis in the State Courts and obtained judgments for the amounts sued for, and that they both subsequently brought suits on said judgments in France, and in said actions in France caused property to be 177
attached. These actions have been removed to England by consent of parties and are still pending. The judgments were obtained in California, and actions commenced in France prior to the filing of petition for discharge.

9th. Petition for discharge, filed December 23, 1875.

10th. Both Wakelee and Cornwall filed opposition to the petition for discharge without cancellation of

178 their judgments, or the dismissal of their actions in France, and subsequently a motion was made to expunge the proof of debt and dismiss the opposition of both.

Jos. Naphthaly and
W. H. L. Barnes,
Solicitors for Opposing Creditors.
J. P. Hoge,
R. Thompson,
Caleb Dorsey,
Attys. for Erwin Davis.

Thereupon the plaintiff's attorney offered in evidence a paper called Plaintiff's Exhibit Notes.
179 Whereupon the defendant's attorney objected to the admission of the same, upon the ground that it was irrelevant, immaterial and incompetent and inadmissible under the issues, and thereupon the said Judge overruled said objection and admitted said paper; to which ruling defendant's attorney then and there noted his exception.

The said paper, Plaintiff's Exhibit Notes, reads as follows:

In re Erwin Davis.

Hoge.

In re Williams.

180 1 Am. L. Times R. 107—113 2 N. B. R.
6 N. B. R. 388.
102 Mass. 472
27 Maine 441
15 Gray 547

Walcott *vs.*
In re Montgomery.
3 B. R. 426
5 B. R. 353

Napthaly.

(Endorsed) —Filed July 20, 1876.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.

Thereupon the plaintiff's attorney read in evi- 181
dence the deposition of W. H. L. BARNES, the whole of which, as read now, follows, and to the questions in which the following objections were taken:

"My name is William H. L. Barnes. My age 52 years. I reside in San Francisco, Cal., and I am by occupation an attorney at law. I was admitted to the bar of the State of New York in the year 1860. I came to California in 1863, arriving here on Tuesday afternoon of April 28th, about four o'clock. The next day but one I was admitted to the bar of this State and tried my first case, and since then I have been in active practice here. I knew Henry P. Wakelee in 1869, and up to 1881 very well. I 182
acted in some of these years as attorney and counsel for H. P. Wakelee.

Q. 6. In what matter?"

Defendant's attorney, Mr. Kenneson, objects to this question as incompetent, immaterial, irrelevant and inadmissible under the issues in this action. Objection overruled; to which defendant's counsel noted an exception.

"A. I was his general attorney.

Q. 7. Did you act specially as attorney in the matter of Erwin Davis in bankruptcy, pending in the United States District Court, for the District of California?" 183

Mr. Kenneson, defendant's counsel, makes the same objection. The said Judge makes the same ruling, and defendant's attorney notes an exception.

"A. I did."

The said Judge thereupon made an order that the defendant's counsel should have the same objection and exception to all of the various questions in the said depositions.

184 "Q. 8. Was this defendant, Erwin Davis, that bankrupt?"

Same objection, ruling and exception.

"A. Certainly."

Q. 9. Who was his regular attorney in that matter in bankruptcy?"

Same objection, ruling and exception.

"A. Well, R. Thompson, Esq., here present, acted for him. Caleb Dorsey, of Tuolumne County, represented him, and Col. Hoge, now Judge Hoge, also represented him, and I think there were one or two more. I don't remember, but those gentlemen, I
185 especially remember. I was Mr. H. P. Wakelee's general attorney, and in all proceedings in which Mr. Wakelee figured against Davis I was his attorney.

Q. 10. What has become of Mr. Wakelee?"

Same objection, ruling and exception.

"A. I am informed and believe that he died in New York, several years ago. I know Mrs. Angelica Wakelee, the plaintiff in this action, who passes now for his widow.

Q. 11. General, did you act for H. P. Wakelee in said matter in bankruptcy in reference to an application for leave to sue the bankrupt?"

186

Same objection, ruling and exception.

"A. Yes, sir.

Q. 12. Please look at the papers now shown you, endorsed 'District Court of the United States, District of California, 563 in Bankruptcy, in the Matter of Erwin Davis, Bankrupt. Petition of Henry P. Wakelee and Notice of Motion. Service of within notice and a copy of affidavit admitted this 26th day of July, A. D. 1872. R. Thompson, Attorney for said Bankrupt. Filed July 27, 1872; Edward B. Cotter, Clerk, by A. D. Grimwood, Deputy Clerk,' and also paper endorsed '563 United States District

Court of the District of California, in the Matter of 187
Erwin Davis, in Bankruptcy. Order allowing H. P. Wakelee to commence suit against Bankrupt. Filed July 8, 1873. Edward B. Cotter, Clerk, by A. D. Grimwood, Deputy Clerk,' and say whether these papers embody the proceedings taken by you on such application for leave to sue."

Same objection, ruling and exception.

"A. These are the papers which were prepared in my office for that purpose.

Q. 13. And the order of the Court made thereon?"

Same objection, ruling and exception?

" A. Yes. 188

Q. 14. Did you act as counsel for said Wakelee in a certain proceeding in said Court, to oppose the discharge in bankruptcy of said bankrupt?"

Same objection, ruling and exception.

" A. I did.

Q. 17. Please look at the paper now shown you, endorsed, '563. United States District Court in the Matter of Erwin Davis, bankrupt. Opposition of H. P. Wakelee to bankrupt's discharge. Filed February 23, 1876, at 3.15 P. M. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk. J. Naphthaly and W. H. L. Barnes, solicitors for contestants,' and state whether that embodies the 189
opposition proceeding taken by you as counsel for said Wakelee."

Same objection, ruling and exception.

" A. It does.

Q. 18. Was that document prepared in your office?"

Same objection, ruling and exception.

" A. Yes; I think so.

Q. 19. General, did you represent H. P. Wakelee in certain proceedings taken in said matter, in said

190 Court, to set aside the objection of H. P. Wakelee to the discharge of the bankrupt, and to dismiss his proofs of debt?"

Same objection, ruling and exception.

"A. Yes, sir.

Q. 20. Please look at the paper now shown you, endorsed, '563 in the United States District Court. In the Matter of Erwin Davis, bankrupt. Petition and notice of motion as to H. P. Wakelee. Filed March 18, 1876, at 11.55 A. M. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk. R. Thompson, attorney for bankrupt,' and say whether that is the original petition and notice of motion filed
191 on the part of said bankrupt?"

Same objection, ruling and exception.

"A. It appears to be the petition and has my admission of service on it.

Q. 21. Please look at the document now shown you, endorsed, 'No. 563, U. S. District Court. In the Matter of Erwin Davis, bankrupt. Stipulation and agreed statement of facts. Filed August 15, 1876, at 11.20 A. M. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' and state if you recognize the signatures thereto."

Same objection, ruling and exception.

"A. I do.

192 Q. 22. Will you say you signed the same?"

Same objection, ruling and exception.

"A. Well, I can tell you by whom it appears to be signed.

Q. 23. Well, you recognize the signatures. I want to prove the handwriting of the gentlemen who signed it.

Same objection, ruling and exception.

"A. My impression is that Mr. Naphthaly signed for himself and myself, and Caleb Dorsey signed for himself and the others. That is my impression.

Upon further examination, I say that for our side, 193
Mr. Naphthaly signed for himself and me and for the other side, Caleb Dorsey signed for all the counsel.

Q. 24. Was that document submitted to the Court on the motion to dismiss?"

Same objection, ruling and exception.

"A. Yes, sir.

Q. 25. Was the motion submitted for decision upon the statement of facts contained in it, after argument?"

Same objection, ruling and exception.

"A. Yes.

Q. 26. General, you were present in court during 194
the argument of said motion?"

Same objection, ruling and exception.

"A. Yes.

Q. 27. Who else was present, as counsel?"

Same objection, ruling and exception.

"Both sides were represented by counsel. I think Col. Hoge was there. Mr. Dorsey was there. Mr. Thompson was there. I was there and Naphthaly was there.

Q. 28. Who represented the side of H. P. Wakelee?"

195

Same objection, ruling and exception.

"A. Naphthaly and myself.

Q. 29. Will you please state what was said by the counsel for Davis, on the argument of that motion, in open court, so far as you can recollect, all that took place, so far as you can recollect?"

To this question defendant's attorney, Mr. Kenneson, made the following objection:

"I object to that. My point is this: Of course, ultimately this is going to lead up to the order which cancelled the proof of debt and struck out

196 the specifications of opposition, and contention is to me made that that order is *res adjudicata*. The oral argument before Judge Hoffman is offered here for the purpose of showing what was decided. The arguments of counsel are no evidence whatever."

Thereupon the said Judge, after hearing read in evidence Judge Hoffman's order, ruled that he would admit the argument of counsel referred to and the evidence as to the oral argument upon such motion, to which the defendant's attorney then and there excepted.

197 The defendant's attorney, furthermore, specially objected that there is no statement of the actual argument, but only the gist of it, and that it was incompetent to prove the oral argument in this way. Whereupon the said Judge overruled the said objection, to which the defendant's attorney then and there excepted.

"A. Well, the case was sharply contested and thoroughly argued. I would not undertake to recite the authorities that were cited, nor to reproduce the speeches. They were all lengthy and able. The gist of the whole matter was, and Mr. Hoge said, that Cornwall and Wakelee having, subsequent to Mr. Davis' petition in voluntary bankruptcy, obtained leave to sue him upon the notes made by Mr. Davis
198 before his petition was filed, and having sued and having obtained judgments against the bankrupt, those judgments constituted in each case new obligation or liability not included within the schedule of Davis' debts at the time his petition was filed, and therefore not affected by his discharge in bankruptcy, and Cornwall and Wakelee were not parties in interest, and were not affected in any way whether or not his discharge was granted. In support of this assertion he cited and read numerous authorities.

Q. 30. General, in view of the objections just interposed, do you remember the exact language used

by the counsel for Davis on the argument of said motion?" 199

Defendant's counsel objects to said question as incompetent, irrelevant and immaterial and for the foregoing reasons. Objection overruled. Exception.

"A. By no means.

Q. 31. Will you give, then, to the best of your recollection, the substance of that language?"

Same objection, ruling and exception.

"A. Well, Col. Hoge made quite an elaborate argument. Many authorities were cited in support of his view, which I can only state briefly, or as I 200 stated before, the gist or point of his argument, which was that the opposing creditors having obtained leave to sue Mr. Davis subsequent to his petition in voluntary bankruptcy, and having sued and obtained judgments against him in a court of competent jurisdiction in this State, that these creditors had no concern with the question whether or not he was to be discharged in bankruptcy, for the reason that the judgments constituted a new obligation or debt, not existing at the time of Davis's petition, and therefore not to be affected by his discharge.

Q. 32. Was Col. Hoge the leading counsel for defendant Davis on that motion?" 201

Same objection, ruling and exception.

"A. I would not say so in the presence of Judge Thompson.

Q. 33. I mean the counsel who argued the case?"

Same objection, ruling and exception.

"A. Well, yes. I think he did more of the discussion than the other gentlemen. I think Col. Hoge made the principal argument. Such is my recollection. He generally does.

Q. 34. Referring now to the order which has just

202 been introduced in evidence, cancelling proofs of debts, and dismissing and disregarding the opposition of H. P. Wakelee, did H. P. Wakelee acquiesce in said order?"

Same objection, ruling and exception.

"A. Yes.

Q. 35. Was there ever any appeal from said order?"

Same objection, ruling and exception.

"A. No.

Q. 36. General Barnes, do you know why no appeal was taken by H. P. Wakelee from the order dismiss-
203 ing and disregarding his specifications of objection?"

Same objection, ruling and exception.

"A. I do.

Q. 37. Will you please state what that reason was?"

Same objection, ruling and exception.

"A. At the time the judgments were obtained, the case of Hahn against Kelly, reported in the 25th Californian Reports, established the law of this State with reference to the presumption of verity upon a judgment roll. That is to say, a judgment roll reciting service would be assumed by the law to
204 be personal service.

Hence our judgments when recovered were considered good. Subsequently and within a short time after these judgments were recovered, the Supreme Court of the United States, in the case of Galpin *vs.* Page, and later on in Pennoyer *vs.* Neff, decided that such was not the presumption, and that jurisdiction of the person of a defendant could not be acquired by a Court of this State, outside of its territorial limits, by publication of the summons, except in cases where you could attach property and then proceed only against the *rem.* This decision

changed, of course, the law of this State because in 205
later cases the Supreme Court of this State decided that, although Hahn *vs.* Kelly had held the other way, yet as the Supreme Court of the United States, in Galpin *vs.* Page and Pennoyer *vs.* Neff, had held the other way, they would hereafter follow the rule laid down by the Supreme Court of the United States and avoid a conflict. Now, all that, except the case of Pennoyer *vs.* Neff, I knew in 1876, when we had this contest before Judge Hoffman, but inasmuch as we had obtained a judgment valid upon its face in December of 1872, and up to the date of the opposition in July or August, 1876, Mr. Davis had made no movement to set aside these judgments I believed that they would still stand because he 206
could not move them or disturb them on account of his own laches. I thought we would be able to make them stick, as we did later on. Subsequently an application was made by Mr. Davis to Judge Dwinelle, of the District Court of California, in and for the Fifteenth Judicial District, for leave to reopen these cases, and plead his discharge in bankruptcy. Judge Dwinelle, though fully informed of the fact that we had been prevented from resisting his discharge in bankruptcy, by reason of these judgments so obtained, for reasons not made known and extremely unsatisfactory to me, did permit him to re-open both of these judgments and plead his discharge in bankruptcy against the judgments 207
which the District Court of the United States had said could not be affected by it. From that order of Judge Dwinelle's I appealed to the Supreme Court of this State, and it very promptly reversed him.

Q. 38. Did H. P. Wakelee ever appear in said proceedings in bankruptcy after the order dismissing his opposition?"

Same objection, ruling and exception.

" A. No.

Q. 39. Did he, at any time after that, ever attempt to oppose the discharge of said bankrupt?"

Same objection, ruling and exception.

208 "A. No.

Q. 40. Referring now to the judgment recovered by H. P. Wakelee under the order of leave to sue, dated November 18, 1873, in the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, will you please state whether H. P. Wakelee, after the recovery of said judgments, took any steps with relation to the collection of the same?"

Same objection, ruling and exception.

"A. He did.

Q. 41. Will you please state what those steps were?

209

Same objection, ruling and exception.

"A. The representative of Henry Kimber & Co., a firm of solicitors doing business in London, was here upon some business of his firm, relating to a sale of California mining properties in London, in which, if I remember right, Erwin Davis was somehow concerned. At all events, from what Mr. Storrey, the representative of Kimber & Co., said to me, I intrusted to him, for Kimber & Co., the judgments in these cases, properly exemplified, so as to enable Kimber & Co., representing Cornwall & Wakelee and another creditor, to bring suit and prove the cases in England or anywhere else Erwin

210 Davis might be found. He took the documents with him to England, and as I am informed by Kimber & Co. and believe, as well as by the payment of their bills of expenses incurred in the litigation, Davis was sued upon those judgments, through the instrumentality or agency of Kimber & Co.

Q. 42. Do you know in what country?"

Same objection, ruling and exception.

"A. Originally in England, and then, as he was reported to have a large amount of money or bonds in France, he was pursued there, and the securities

were attached. Subsequently, by agreement, for 211
economic reasons, I believe, the matter was retransferred to England. That is as near as I remember. Of course, I was not there and took no part in it and only gather it up now from hearsay.

Q. 43. General, did you, at the time of these several proceedings taken by you, acquaint H. P. Wakelee with them?"

Same objection, ruling and exception.

"A. Both Cornwall and Wakelee were thoroughly aware of everything that went on and took a lively interest in the pursuit of Mr. Davis.

Q. 44. Did you fully advise them of the effect of 212
these proceedings?"

Same objection, ruling and exception.

"A. Yes, as fully as we generally do our clients. Both of them were intelligent men, Mr. Cornwall particularly so, and they understood the business as well as I did.

Q. 45. In your answer to question 37 you have spoken of a reversal of the Supreme Court of California of an order of Judge Dwinelle. Will you please look at the document now shown you, purporting to be transcript on appeal and certified copy of remittitur in the case of Wakelee *vs.* Davis, in the Supreme Court of California, and state whether they 213
are the proceedings that you have referred to in your answer to question 37?"

Same objection, ruling and exception.

"A. I hold in my hand a transcript on appeal from the Fifteenth District Court to the Supreme Court of the State of California, in the case of Wakelee *vs.* Davis, which is the transcript on appeal in the matter to which I have here alluded.

Q. 46. Do you know of any other matters or thing to the interest of the plaintiff in this suit? If so,

214 will you please testify to the same as though you were particularly interrogated thereto?'

Same objection, ruling and exception.

"A. I know of nothing except that the English action, brought by H. P. Wakelee, was discontinued without a trial, upon the merits, and the reason it was discontinued was that the expense of the litigation so far has been so great that it did not seem that the amount that we would realize, if we were completely successful in the action, would equal the expense of recovery."

During the reading of the deposition of the said
215 W. H. L. Barnes, the plaintiff's attorney, offered various documentary evidence. The proceedings upon which were as follows:

The plaintiff's attorney offers in evidence the document marked "Plaintiff's Exhibit Leave," consisting of a petition for leave to sue, notice of motion and the order thereon. The defendant's attorney objected to the same as immaterial, irrelevant and incompetent and inadmissible under the issues.

Whereupon the said Judge overruled said objection and admitted said paper; to which the defendant's attorney then and there excepted.

The said Plaintiff's Exhibit Leave reads as fol-
follows:

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IN THE DISTRICT COURT OF THE UNITED STATES 217

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS, in Bankruptcy.

To Messrs. THOMPSON & WILSON, 218
Attorneys for the Bankrupt Erwin Davis.

You will please take notice, that on behalf of H. P. Wakelee, a creditor of said bankrupt, I shall move this Honorable Court at the court room thereof in the City and County of San Francisco, on Tuesday the 8th day of July, A. D. 1873, at the opening of the Court on that day, or as soon thereafter as counsel can be heard for permission to enforce the collection, payment and satisfaction of the claims of petitioner (which are fully set out in his petition) by proper and necessary actions and suits at law and in equity in any State or country having jurisdiction of the person and property of said 219
Erwin Davis, and for any other and further relief to which petitioner may be entitled.

The motion will be made upon the annexed petition, of which a correct copy is herewith served on you, and upon the files, records, papers and proceedings in the above entitled matter.

Yours, &c.,
WM. H. L. BARNES,
Atty. for Petitioner.

Dated San Francisco, 28th day of June, 1873.

220 IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS, in Bankruptcy.

221 To The Honorable OGDEN HOFFMAN, Judge of the said District Court of the United States.

The petition of H. P. Wakelee respectfully represents unto your Honor as follows, that is to say:

That on or about September 11, 1869, Erwin Davis above named then being a resident of the District of California filed his petition in bankruptcy in this Honorable Court, pursuant to the provisions of the Act of Congress of the United States, entitled "An Act to establish a uniform system in bankruptcy throughout the United States," approved March 2d A. D. 1867, and the acts amendatory thereof and supplementary thereto, praying that he might be ad-
222 judged by the Court to be a bankrupt within the purview of said act, and that he might be decreed to have a certificate of his discharge from all his debts provable under the same.

That on or about September 30, 1869, the said Davis was thereupon duly adjudged a bankrupt by Asher B. Bates, Esq., a Register in Bankruptcy to whom said petitioner had been referred by said Court.

That one William Burling of said City and County of San Francisco, was on or about November 17, 1869, duly appointed by said Asher B. Bates, Register in Bankruptcy as aforesaid, assignee in bank-

ruptcy of the estate of the said Davis. That the said 223
William Burling duly qualified and entered upon the discharge of his duties as such assignee, and that he is still acting as such.

That on or about November 19, 1869, the said Register executed an instrument in writing by which he assigned all the estate, real and personal of the said Davis with all his deeds, books and papers relating thereto to the said William Burling, assignee as aforesaid; that at the time of filing said petition in bankruptcy by the said Davis he was indebted to your petitioner in large sums of money as follows, to wit:

The sum of eighteen hundred and four dollars and sixty-five cents ($1,804.65) due on the 25th day of 224
September, 1869, payable in gold coin of the United States with interest, at the rate of one per cent. per month from the 26th day of August, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit A." Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 25th day of October, 1869, payable in gold coin of the United States with interest, at the rate of ten per cent. per annum, from the 25th day of October, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked 225
"Exhibit B."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965) due on the 24th day of November, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum, from the 24th day of November, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit C."

Also a certain other sum of nineteen hundred and sixty-five dollars due on the 24th day of December,

226 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum, from the 24th day of December, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed, marked "Exhibit D."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965) due on the 23d day of January, 1870, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum, from the 23d day of January, 1870, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit E."

227 Also a certain other sum of six thousand and fifty-five dollars and thirty-five cents ($6,055.35), payable on demand in gold coin of the United States, with interest at the rate of one per cent. per month, from the 8th day of September, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit F."

That your petitioner made due proof of said debts, as required by the Act of Congress aforesaid, and duly filed the same in the said proceedings in bankruptcy with the said assignee.

That your petitioner was on the said 11th day of September, 1869, and ever since has been the owner
228 and holder of said promissory notes and each of them.

Your petitioner has been informed and believes, and charges the fact to be that, except a small amount of personalty of but little value surrendered to the said assignee by said Davis, all his property was encumbered by mortgages and liens of various descriptions, amounting to much more than the value of the same. That no part of the estate of said bankrupt which came to the hands of the said assignee has been distributed among or to any of the creditors of the estate whose claims were unsecured (of which claims your petitioner's is one).

That there will be, as your petitioner is informed 229
and believes and therefore charges on such information and belief, no assets or other thing from said property to be distributed among such creditors as himself.

That the property of said bankrupt which came to the hands of the said assignee is wholly insufficient to discharge the liens and incumbrances thereon, and the costs of the proceeding in bankruptcy, and that your petitioner's claims are wholly due and unpaid.

That although said Davis was duly adjudged a bankrupt as afosesaid; he has made no application to the Court for a discharge from his debts which delay on his part is unreasonable and fraudulent as 230
well as unnecessary if ever he intends to apply for a discharge, which he does not intend to do according to your petitioners's information and belief.

That your petitioner is informed and believes and therefore charges upon such information and belief that said Davis fraudulently concealed the account books and memoranda relating to his estate and effects, and fraudulently neglected and failed to deliver the same to his said assignee although often requested by him so to do.

That he did not surrender or deliver all of his property to his said assignee but wilfully and fraudulently concealed some portion thereof.

That your petitioner is advised and believes that 231
said Davis could not obtain a final discharge from his debts if he were to apply therefor to this Honorable Court, by reason of his having committed the fraudulent acts above set forth, and many other acts in contravention of the letter and spirit of the Act of Congress hereinbefore mentioned.

That your petitioner is informed and believes and therefore charges the fact to be that since the filing of his said petition in bankruptcy, said Davis has acquired a large amount of property and estate in the State of New York and elsewhere of the value of not less than one hundred thousand dollars, which

232 is held by him in his own name and right or by others whose names are unknown to petitioner but in trust for him. That all or most of said property can be reached by the requisite proceedings and subjected to the payment of your petitioner's just claims and demands.

That your petitioner's claims and demands above mentioned will be barred by the Statute of Limitations in force in the State of New York where said Davis is now reputed to reside, unless he shall speedily commence proceedings there against said Davis, and he will therefore be unable to enforce the payment thereof in the State of New York or from instituting the proper proceedings to reach
233 the said bankrupt's estate.

Wherefore your petitioner prays that leave may be granted him to enforce the collection payment and satisfaction of his said claims and demands, and for such purpose to institute and maintain all requisite and necessary actions and suits at law and equity against the said bankrupt Erwin Davis as he may be advised in any court or courts in any State or country having jurisdiction of the person or property of the said Erwin Davis, and for such other and further relief as may be agreeable to equity.

And as in duty bound your petitioner will ever pray, &c.

WM. H. L. BARNES,
Attorney for Petitioner.

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City and County of San Francisco, ss.:

H. P. WAKELEE, being duly sworn, deposes and says: He is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

H. P. WAKELEE.

Subscribed and sworn to before me this twenty-eighth day of June A. D. 1873.

EDWD. B. COTTER,
U. S. Commissioner.

"Exhibit A." 235

$1,804. 65–100. SAN FRANCISCO, Augt. 26, 1869.

On the 25th day of September, 1869, at three o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States I promise to pay to the order of H. P. Wakelee, at the Bank of California in this City, eighteen hundred and four 65–100 Dollars with interest from date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

236

"Exhibit B."

$1,965.00. SAN FRANCISCO, August 26, 1869,

On the 25th day of October, 1869, at three o'clock P. M. of that day (no grace), for value received in gold coin of the United States I promise to pay to the order of H. P. Wakelee at the Bank of California in this City, Nineteen hundred and sixty-five Dollars with interest from after due at the rate of per cent. per month until paid, payable monthly; both principal and interest payable in the like gold coin.

ERWIN DAVIS. 237

Exhibit "C."

$1,965.00. SAN FRANCISCO, August 26, 1869.

On the 24th day of November, 1869, at three o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this City, nineteen hundred and sixty-five dollars with interest from after due at the rate of per cent.

238 per month until paid, payable monthly, both principal and interest, payable in the like gold coin.

ERWIN DAVIS.

Exhibit "D."

$1,965.00. SAN FRANCISCO, August 26, 1869.

On the 24th day of December, 1869, at three o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this City, nineteen hundred and sixty-five dollars, with in-
239 terest from after due at the rate of per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

Exhibit "E."

$1,965.00. SAN FRANCISCO, August 26, 1869.

On the 23d day of January, 1870, at three o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the
240 Bank of California, in this City, nineteen hundred and sixty-five dollars, with interest from after due at the rate of per cent. per month until paid, payable monthly both principal and interest, payable in the like gold coin.

ERWIN DAVIS.

Exhibit "F."

SAN FRANCISCO, Sept. 8, 1869.

On demand I promise to pay to H. P. Wakelee or order six thousand and fifty-five $\frac{35}{100}$ dollars in gold

coin, with interest from date at the rate of one per cent a month. 241

$6,055.35. ERWIN DAVIS.

{ U. S. Int. Rev. stamps $3.05 cancelled. }

(Endorsed)—Service of the within notice and of copy of affidavit admitted this 28th day of June, A. D. 1875.—R. Thompson, Atty. for sd. Bkpt. —Filed June 28, 1873, at 12.15 M.—Edwd. B. Cotter, Clerk.—A. D. Grimwood, Dep. Clk.

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242

At a Stated Term of the District Court of the United States of America for the District of California, held at the Court Room, in the City of San Francisco, on Tuesday, the 8th day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Present—The Honorable OGDEN HOFFMAN, *Judge*.

In re ERWIN DAVIS, In Bankruptcy.

243

In this matter the petition of H. P. Wakelee for leave to sue the bankrupt herein came on for hearing this day, and after hearing W. H. L. Barnes, Esq., Attorney for the said Wakelee, and R. Thompson, Esq., for the bankrupt, it is ordered that the said petition be and the same is hereby granted.

And thereupon an order to that effect was duly signed and filed herein.

The plaintiff's attorney offered in evidence Plaintiff's Exhibit Opposition. The defendant's attorney

244 objected to the same as incompetent, irrelevant and immaterial, and the said Judge overruled the said objections; to which the defendant's attorney then and there excepted.

The said Plaintiff's Exhibit Opposition reads as follows:

IN THE DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF CALIFORNIA.

245 IN THE MATTER OF ERWIN DAVIS, Bankrupt.

And now comes H. P. Wakelee, and respectfully shows to this Honorable Court:

1st. That he is a creditor of said Erwin Davis, bankrupt.

2nd. That he has duly proved his claim against the Estate of said Bankrupt in the manner provided
246 by law.

3rd. That he opposes the petition of said Bankrupt from a discharge of the debts and liabilities, and having duly filed his appearance on the return day set by the Court for the hearing of said petition for a discharge, presents the following grounds and specifications of opposition to the discharge of said bankrupt:

I.

That said Bankrupt has concealed his books relating to his Estate and effects.

II. 247

That said bankrupt, being a merchant and trader, has not, subsequent to the passage of the Act of Bankruptcy referred to in his said petition, kept proper books of account.

III.

That he has procured the assent of G. A. Treadwell, of Wm. J. Bryan, of G. F. Braggs, of Marsh, Pillsbury & Co.; of J. W. Perkins and W. G. Taylor, of J. W. Perkins, of William Thompson, Jr., of W. G. Taylor, of Williams, Dean & Co., of C. L. Place & Co., of Robert Hannigan, of H. H. Hill, of the London and San Francisco Bank, Limited, a foreign corporation 248 doing business at San Francisco, in the State and District aforesaid; of C. J. Pillsbury, said persons being creditors of said Erwin Davis, bankrupt, and of each and every of them, to his discharge in bankruptcy by pecuniary considerations and obligations.

IV.

That he has influenced the action of the creditors named in specification III. and of each of them, with reference to his discharge in bankruptcy by pecuniary considerations and obligations.

V.

That said Erwin Davis has been guilty of fraud contrary to the true intent of the Act of Congress 249 referred to in his said petition, in this: In that the said Erwin Davis having been duly summoned and required to appear for the purposes required by section 26 of said act, did clandestinely and fraudulently and while said examination was pending and in progress, abscond and depart from this State and district, and said Erwin Davis has ever since remained absent and out of the jurisdiction of this Court and of the jurisdiction of the Courts of the United States of America.

And this contestant respectfully shows to this Honorable Court that said Erwin Davis is not en-

250 titled to have and receive from this Court his discharge in bankruptcy, because said Erwin Davis has not in all things conformed to his duty under said act, in this:

That said Erwin Davis having been adjudged a bankrupt on his own petition, and having become subject to the orders of this Court, said Erwin Davis was duly summoned and required to appear before the Register in Bankruptcy, before whom these proceedings were pending, to be examined on oath upon matters relating to the disposal or condition of his property and generally for the purposes required by section 26 of said Act of Congress, that pending his said examination and during an adjournment of
251 such examination the said Erwin Davis, without leave of Court or that of his creditors or assignee in bankruptcy, or of any other person having authority to grant such leave or consent, withdrew himself from such examination and clandestinely and fraudulently departed from this State, and went out of the jurisdiction of this Court and departed for Europe, where said Erwin Davis has ever since been.

That by reason thereof said Erwin Davis was not fully examined as required, and by reason of his said absence this opposing creditor has not been able to avail himself of his rights to examine said bankrupt in accordance with the provisions of said
252 section 26, and of the provisions of said Bankrupt Act.

That such withdrawal occurred in the year 1870, and said Erwin Davis has ever since that time remained absent.

Wherefore this contestant prays that the application of said bankrupt for his discharge in bankruptcy be denied.

J. Napthaly and
W. H. L. Barnes,
Att'ys for Contestant.

(Endorsed)—Filed February 23, 1876, at 3:15 P. M.—Southard Hoffman, Clerk.—By A. D. Grimwood, Deputy Clerk.

The plaintiff's attorney offered in evidence plaintiff's Exhibit "Petition to Dismiss," to which the defendant's attorney objected as immaterial, irrelevant and incompetent, and the said Judge overruled the said objections and admitted the same, and the defendant's attorney then and there excepted. 253

The said plaintiff's Exhibit Petition to Dismiss reads as follows:

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS, a Bankrupt. 254

To H. P. WAKELEE, Esq., and J. NAPTHALY and W. H. L. BARNES, his attorneys:

You will please take notice, that upon behalf of Erwin Davis, the above named bankrupt, I shall move this Honorable Court, at the court room thereof, in the City and County of San Francisco, on Tuesday, the 28th day of March, 1876, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order cancelling the proof of debt heretofore made in the above 255
entitled cause against the estate of the said Erwin Davis, by H. P. Wakelee, and to dismiss and disregard the specifications of opposition filed by the said H. P. Wakeleee to the discharge of the said Erwin Davis in bankruptcy.

The motion will be made upon the annexed petition, of which a correct copy is herewith served upon you, and upon the files, records, papers and proceedings in the above entitled matter.

Dated San Francisco, March 17, 1876.

R. THOMPSON,
Atty. for Petitioner.

256 IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF CALIFORNIA.

IN THE MATTER OF ERWIN DAVIS, a Bankrupt.	In Bankruptcy.

257 And now comes Erwin Davis, the above named bankrupt, by his attorney, R. Thompson, and moves the Court for an order cancelling the proof of debt heretofore made in the above entitled cause against the estate of the said Erwin Davis, by Henry P. Wakelee, and to dismiss and disregard the specifications of opposition filed by the said Henry P. Wakelee to the discharge of the said Erwin Davis in bankruptcy, on the following grounds, that is to say:

The said Henry P. Wakelee, on or about the the 28th day of June, A. D. 1873, and after he had proved up his debt or claim against the said estate of Erwin Davis, petitioned this Court for and, on or about the 8th day of July, A. D. 1873, obtained from this
258 Court an order granting leave to the said Henry P. Wakelee to commence any action or actions at law or suits in equity against the said Erwin Davis, the bankrupt herein, as he may be advised, in any State or country having jurisdiction of the person or property of the said Erwin Davis.

That thereafter, to wit, on or about the 19th day of July, A. D. 1873, the said Henry P. Wakelee commenced an action in the Fifteenth Judicial District Court, in and for the City and County of San Francisco, against the said Erwin Davis, for the same cause of action on which he had proved up his debt in the said bankruptcy proceedings, and in the due

course of the said action the said Henry P. Wakelee 259
obtained a judgment of the said Fifteenth Judicial District Court in his favor, and against the said Erwin Davis, which said judgment still stands of record in the said Fifteenth District Court, and is in full force.

R. THOMPSON,
Attorney for Petitioner.

Service of within is hereby admitted this 18th day of March, 1876.

J. NAPTHALY,
W. H. L. BARNES,
Att'ys for Contestants.

(Endorsed).—Filed March 18th, 1876, at 11-55 A.M.— 260
Southard Hoffman, Clerk.—By A. D. Grimwood, Deputy Clerk.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.:

R. THOMPSON, being duly sworn, doth depose and say: That he is the attorney for the above-named bankrupt, Erwin Davis; that he has read the foregoing petition and the statement upon which the same is based, and that the facts set forth in said statement are true of his own knowledge.

R. THOMPSON.

Subscribed and sworn to before me }
this 18th day of March, 1876. }
261

DAVID LYON,
Commissioner U. S. Circuit Court,
Dist. of California.

Service of within is hereby admitted March 18th, 1876.

J. NAPTHALY,
W. H. L. BARNES,
Att'ys for Contestants.

(Endorsed).—Filed March 18th, 1876, at 11.55 A. M.—
Southard Hoffman, Clerk.—By A. D. Grimwood, Deputy Clerk.

262 Plaintiff's attorney offered in evidence "Plaintiff's Exhibit Facts," which was objected to as immaterial, irrelevant and incompetent, which objection was overruled and the defendant excepted. This exhibit is elsewhere shown herein.

Plaintiff's attorney offered in evidence the order made by Judge Hoffman, granting said motion to dismiss; to which the defendant's attorney objected as immaterial, irrelevant and incompetent, and the said judge overruled the said objection; to which the defendant's attorney then and there excepted.

The said order reads as follows:

IN THE UNITED STATES DISTRICT COURT.

263

DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS, a Bankrupt.

The matter of the motion of Erwin Davis, the above named bankrupt, for an order cancelling the proof of debt heretofore filed in this Court by H. P. Wakelee against the said estate and for an order
264 dismissing and disregarding the specifications of opposition filed by the said Wakelee to the final discharge of the said Davis in bankruptcy, coming on regularly to be heard and it having been argued by the attorneys for the respective parties and duly submitted upon the proofs taken, and it having been duly considered by the Court,

It is hereby ordered, adjudged and decreed that all proofs of debt heretofore made and filed in this Court by H. P. Wakelee against the estate of Erwin Davis, a bankrupt, be and the same are hereby cancelled, and it is further ordered, adjudged and decreed that the specifications of opposition heretofore

filed in this Court to the final discharge of Erwin 265
Davis, in bankruptcy, by H. P. Wakelee, be and the same are hereby dismissed and set aside and shall in all things hereafter be disregarded.

OGDEN HOFFMAN,
Dist. Judge.

(Endorsed)—Filed October 31st, 1876, at 11:20 A. M. —Southard Hoffman, Clerk.—By A. D. Grimwood, Deputy Clerk.

The plaintiff's attorney offered in evidence Plaintiff's Exhibit Transcript, to which the defendant's attorney objected as immaterial, irrelevant and incompetent, and the said judge overruled the said 266
objection; to which the defendant's attorney then and there excepted. This exhibit is shown heretofore herein.

Thereupon the plaintiff's attorney offered to read the deposition of JOSEPH NAPTHALY, to which the defendant's attorney objected on the ground that the same was irrelevant, immaterial and incompetent and inadmissible under the issues, and the said Judge overruled the said objection, to which the defendant's attorney then and there excepted.

Thereupon the plaintiff's counsel read the said deposition, and to each and every question and cross-question the defendant's counsel objected on the ground that it was irrelevant, immaterial and incompetent 267
and inadmissible under the issues, and in each case the said Judge overruled the said objections, to which the defendant's counsel, in each instance, duly excepted.

The said deposition is as follows. All that was read being now set forth:

"Q. 1. State your name, age, place of residence and occupation?

A. My name is Joseph Naphthaly; my age, forty-seven years; I reside in San Francisco and am by profession a practicing attorney at law.

268 Q. 2. How long have you been engaged in your profession as an attorney at law?

A. Since 1865.

Q. 3. In this city?

A. Yes, sir.

Q. 4. Did you know Henry P. Wakelee in his lifetime, Mr. Naphthaly?

A. I knew Henry P. Wakelee in his lifetime; yes, sir.

Q. 6. Are you acquainted with Pierre B. Cornwall, of this city and county.

A. Yes, sir; I know him.

Q. 7. Mr. Naphtha y, did you act in any of those years as attorney and counsellor for H. P. Wake-
269 lee?"

Defendant's attorney objected to said question as immaterial, irrelevant and incompetent and not within the issues. Said Judge overruled said objection, and the defendant's attorney then and there excepted.

"A. I acted as such at a certain time. I don't know the exact year. I think it was in 1875 or 1876.

Q. 8. In what matter?"

Same objection, ruling and exception.

"A. In connection with General Barnes, as attor-
270 ney for Cornwall and Wakelee in the bankruptcy proceedings of Erwin Davis that was then pending in the United States District Court of this State.

Q. 9. Was the said Erwin Davis, bankrupt, the defendant in this case?"

Same objection, ruling and exception.

"A. That I don't know.

Q. 10. Who was his regular attorney in the matter in bankruptcy?"

Same objection, ruling and exception.

"A. Judge Robert Thompson.

Q. 11. Anybody else appear for him?" 271

Same objection, ruling and exception.

"A. In the bankruptcy case, I think, J. P. Hoge, a present Judge of the Superior Court of this city and county, assisted Judge Thompson in certain matters in that case, but I don't know whether he acted throughout the entire case.

Q. 12. Do you recollect any one else at any time who appeared in that proceedings as attorney for the bankrupt?"

Same objection, ruling and exception.

"I have an idea that Caleb Dorsey, of Tuolumne County, appeared for him, but I am not sure. 272

Q. 13. Do you know what became of Mr. Wakelee?"

Same objection, ruling and exception.

"A. Yes, sir; I know he is dead.

Q. 14. Did you act as attorney for H. P. Wakelee in said matter of bankruptcy, in reference to an application for leave to sue the bankrupt?"

Same objection, ruling and exception.

"A. I cannot remember, unless I look at the record.

Q. 15. Did you act as counsel for H. P. Wakelee in a certain proceeding in said Court to oppose the 273 discharge in bankruptcy of said bankrupt?"

Same objection, ruling and exception.

"A. In connection with General Barnes, I did.

Q. 16. Please look at the paper now shown you, endorsed: '563 U. S. District Court. In the Matter of Erwin Davis, Bankrupt. Oopposition of H. P. Wakelee to Bankrupt's discharge. Filed February 23d, 1876, at 3.15 P. M. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk. J. Naphthaly and Delos Lake, Solicitors for Contestant.' a certified copy of which document is in evidence herein,

274 marked, 'Plaintiff's Exhibit, Opposition,' and state whether that embodies the proceedings taken by you and Mr. Barnes, as counsel, in opposition to the application?"

Same objection, ruling and exception.

"A. This paper is an opposition to the discharge of Erwin Davis, written by my clerk, Mr. I. P. L. Brandt, now an attorney of this city, but my clerk then. It is signed by myself and Mr. Barnes, as solicitors for contestant. I drew the opposition and gave my clerk the paper to copy, and this is his copy.

Q. 17. Did you represent the H. P. Wakelee in
275 a certain proceedings taken in said matter in said Court to set aside the objection of H. P. Wakelee to the discharge of the bankrupt and to dismiss his proofs of debt?"

Same objection, ruling and exception.

"A. By reference to the petition now handed me, I see that these papers were served upon me as one of the attorneys in the case of Judge Robert Thompson, and service admitted by my clerk in my name and in the name of General Barnes. The admission of service is in my clerk's writing. I also hold in my hand a certified copy of that document, which is marked with the title of this case, 'Plain-
276 tiff's Exhibit, Petition to Dismiss.' I make the same answer with reference to the petition for an order of court to cancel the proof of debt made in the Erwin Davis case by Mr. Cornwall and served upon me. The admission of service is made in the name of General Barnes and myself by my clerk. I hold in my hand a certified copy of that paper, marked with the title of this case, 'Plaintiff's Exhibit, Petition to Dismiss.'

Q. 18. Please look at the paper now shown you, endorsed '563 U. S. District Court. In the Matter of Erwin Davis, Bankruptcy. Stipulation and agreed statement of facts. Filed August 15, 1876, at 11.20

A. M. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' and state if you recognize the signatures thereto, a certified copy of which paper is also handed to you, which is introduced in evidence in this case and marked 'Plaintiff's Exhibit Facts.' " 277

Same objection, ruling and exception.

" A. I recognize the signatures of 'Joseph Napthaly and W. H. L. Barnes' as being in the handwriting of my clerk, Mr. Brandt, and signed by him under authority of General Barnes and myself. The signatures of J. P. Hoge, Judge Thompson and Caleb Dorsey, I don't know in whose handwriting they are, although the writing looks like that of Judge Thompson. 278

Q. 19. Was that document submitted to the Court on a motion to dismiss? "

Same objection, ruling and exception.

" A. It was.

Q. 20. Was the motion submitted for decision upon the statement of facts contained in it after argument?"

Same objection, ruling and exception.

" A. I believe it was. By reference to the document, I find that to be the fact. The endorsement upon the back of this paper, 'and agreed statement of facts' is in the handwriting of Mr. Grimwood, 279 the Deputy Clerk of the Court at that time.

Q. 21. Were you present in court during the argument of said motion to dismiss? "

Same objection, ruling and exception.

" A. I was.

Q. 22. Who else was present as counsel?"

Same objection, ruling and exception.

" A. I recollect only Judge Hoge, Judge Thompson, General Barnes and myself.

280 Q. 23. Will you please state who these gentlemen, respectively, represented?"

Same objection, ruling and exception.

"A. Judge Thompson was the chief counsel for Mr. Davis. Judge Hoge was, as I understood, an assistant of Judge Thompson's in that matter. General Barnes and myself appeared for the creditors, Cornwall and Wakelee.

Q. 24. Were these motions of the bankrupt, Davis, to dismiss the objections of Cornwall and Wakelee, heard together?"

Same objection, ruling and exception.

281 "A. I believe they were heard together. They were based upon the same statement of facts, and I believe they were heard together.

Q 25. Will you please state what was said by the counsel for Davis on the argument of the motion in open court, so far as you can recollect?"

Defendant's counsel objects to this question specially upon the ground that there is only the gist or substance stated; that the argument should be stated, not in substance but as it occurred; that this objection is made in addition to the general objection to each question, as above stated. Thereupon the said Judge overruled the said objection; to which the defend-
282 ant's counsel then and there excepted.

"A. That is too much of a question to ask me at this time of life. I remember, of course, some parts of it. Judge Hoge appeared in the case and made the chief argument in the case—that is, Judge Thompson yielded to Judge Hoge in making the argument of the case. I remember Judge Hoge being there with an unusually large number of books. I think Judge Thompson also argued the matter. I said something in reply and, I believe, I filed some authorities in the case, or, rather, I filed a reply to the authorities cited by Judge Hoge. I have

looked over my papers in my office and have had 283
my clerk make a diligent search for that brief, but I find nothing there; but unquestionably I must have said something in reply to their motion, because it was something new at the time. I supposed bankruptcy proceedings did not change the character of indebtedness, even if judgment was recovered afterwards. I have not been able to find any copy of my brief among my papers. I only find one single paper among my papers relating to that matter, and that is a list of the creditors. Since the time of the argument of that motion I have moved my office, and am associated with other gentlemen as attorneys, and that brief may still be in existence, together with the other papers, but I have not been 284
able to find them, although I have looked for them wherever I was likely to find them.

Q. 26. Will you please state the substance, as far as you can recall it, of what was said by counsel for the bankrupt, Davis, on the argument of that motion to dismiss?"

Same objection, ruling and exception.

"A. I can tell you only generally what was claimed. The motion to dismiss was made upon the ground that these gentlemen had procured a judgment and had taken themselves out of the jurisdiction of the bankruptcy court by trying to improve their condition, and that having done so—I believe 285
it was claimed there was an attachment levied at that time upon some things, somewhere, but I am not distinct in my recollection upon that subject; my best impression is that that was one of the points suggested—that these creditors had, by bringing the suit and attaching the property, taken themselves out of the jurisdiction of the bankruptcy court voluntarily, and that they had no right to prevent Mr. Davis' discharge by reason thereof. We claimed, on the other hand, that it did not make any difference; that the debt had not been merged in the judgment so as to drive them out of the Court, so to

286 speak, and not allow them to participate in the proceedings against Davis. We were apprehensive that the discharge in bankruptcy would discharge the judgment debt just the same as it would have discharged the original debt as it existed at the time of filing the petition. Judge Hoge strenuously argued that that was not so, that the new judgments would not be discharged by the bankruptcy proceeding, and that we would lose nothing by it. That, in substance, according to my recollection, is what occurred in Court at that time.

Q. 27. Mr. Naphthaly, in view of the objection just interposed by counsel, will you please state, so far as you can, and confine your answer to what was
287 stated in Court by Judge Hoge on the argument in question?"

Same objection, ruling and exception.

"A. Of course it is impossible for me to give all that was said, or even the exact language of anything that was said. The petitions and papers on file show what was before the Court; and when I say 'it was claimed,' I mean to say it was said by the moving party that the motion made by them should be granted for the reason that the two creditors had taken themselves without the jurisdiction of the bankruptcy court; had brought suit, and, I think, attached certain property of Erwin
288 Davis, and that any discharge that obtained in a bankruptcy court would not discharge that judgment, and the creditors would not be affected by it.

Q. 28. Do you know whether an order was subsequently entered upon the motion to dismiss?"

Same objection, ruling and exception.

"A. I know Judge Hoffman decided the case, but I did not draw any order, because the order was not in my favor. The paper that you have just handed to me is a paper having the signature of Honorable Ogden Hoffman, District Judge, appended thereto, and is, of course, the order that he signed in the

matter. I have in my hand a certified copy of the 289
said order, which is marked in this case 'Plaintiff's Exhibit Cancellation.'

Q. 29. Referring to the order that you have just looked at, did H. P. Wakelee accept and acquiesce in said order."

Same objection, ruling and exception.

"A. He did. He certainly had to. There was no appeal from this order. It was perfectly satisfactory to General Barnes, under whose instructions I mainly acted in this case. I was only called into the case because he believed I had had more experience in bankruptcy proceedings than he had had. I was not the regular attorney for these 290
gentlemen. General Barnes was.

Q. 30. Do you know whether H. P. Wakelee ever afterwards in any way appeared in said bankruptcy proceedings to oppose or set aside such discharge?"

Same objection, ruling and exception.

"A. I don't know anything about it. My connection with these claims ended with that order.

Q. 31. Mr. Naphthaly, will you please state why this decision on the motion was satisfactory to you and to General Barnes?"

Same objection, ruling and exception.

"A. It was satisfactory to me because it was sat- 291
isfactory to General Barnes, and to General Barnes it was satisfactory because he thought, as far as I recollect, that it was a pretty good thing to have a judgment against Erwin Davis, because he was a man of great talents and ability to make a great deal of money, and a man of vast resources, and that decision suited him. It only suited me because I followed instructions.

Q. 32. Did you consider that after that order dismissing and setting aside the opposition of H. P. Wakelee gave you a valid judgment against Davis?"

Same objection, ruling and exception.

292 "A. As far as Judge Hoffman's decision could make it, of course, I didn't think he was right, but his decision certainly was final in that case, because no appeal had been taken from it.

Q. 33. Mr. Naphthaly, did you advise your clients as to the effect that this order would have upon their judgment?"

Same objection, ruling and exception.

"A. No, sir; I did not. I don't know whether I ever spoke with them about it. I know General Barnes, and I talked about the matter, and he let it rest where it was. He was willing to take Judge Hoffman's decision in this matter as a matter in
293 favor of his clients."

CROSS-EXAMINATION:

"Q. 1. Mr. Naphthaly, you and Mr. Barnes did what you could to prevent the entry of this order by way of argument, did you not?"

Same objection, ruling and exception.

"A. We did everything that was proper to be done.

Q. 2. It was argued fully on the side of Mr. Cornwall and Mr. Wakelee?"

294 Same objection, ruling and exception.

"A. Argued thoroughly.

Q. 3. And everything that could be done on their behalf was done to avoid the entry of this order cancelling their proofs?"

Same objection, ruling and exception.

"A. Everything that could be done in a court of justice to present both sides of the case was done both by Judge Thompson, who was very energetic in the matter, and ourselves, and the Court decided against us.

Q. 4. How, then, is it that the final order was so satisfactory to General Barnes?" 295

Same objection, ruling and exception.

"A. The final order was satisfactory because it had to be satisfactory, and General Barnes said really that the resources of Mr. Davis was so great and that he was a man of such great activity of mind and intellect that he would not rest a poor man, and that sooner or later he would get up in the world again and pay his debts, and Mr. Barnes was satisfied with the decision of the Court."

REDIRECT:

"Q. 9. You were asked on cross-examination why you were satisfied with the order dismissing objection of the creditors. Was it the fact that all the creditors then before the Court considered the judgments they had obtained in the State Court as valid." 296

Same objection, ruling and exception.

"A. Well, I can only answer that in the way I have stated before. The judgments were valid, but we had an idea that the discharge in bankruptcy would discharge that jndgment as well, but then the Court decided otherwise. General Barnes, who was really the representative of these parties, was satisfied with the decision, and took no steps to set it aside, because he thought he could make his judgment at some future time. In fact, he was glad that he lost his case." 297

Thereupon the plaintiff's counsel offered to read in evidence the deposition of JUDGE HOFFMAN, to which the defendant's attorney objected, upon the ground that the same was irrelevant, immaterial and incompetent and not within the issues, and the said Judge overruled the said objection; to which the defendant's attorney then and there excepted.

Plaintiff's attorney proceeded to read the said de-

298 position of Ogden Hoffman, which is as follows, and the whole of which, as read, is here given?

"Q. 1. Judge, will you please state your age, residence and your occupation? A. I am sixty-seven years of age. My residence is San Francisco, and I am United States District Judge for the Northern District of California.

Q. 2. How long have you been such Judge?

A. Since February 28, 1851.

Q. 3. Will you please look at the papers now shown you, 'endorsed 563. In the United States District Court. In the matter of Erwin Davis, bankrupt. Petition and notice of motion as to the opposition of H. P. Wakelee. Filed March 18, 1876 at 11.55 A. M.
299 Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk. R. Thompson, attorney for bankrupt,' a certified copy of which has been offered in evidence in this case with the deposition of General Barnes, marked 'Plaintiff's Exhibit Petition to Dismiss,' and state whether you presided on the decision of said motion, and whether the order now shown you, endorsed, 'United States District Court. In the matter of Erwin Davis, bankrupt. Order cancelling proofs and setting aside opposition of H. P. Wakelee. Filed October 31, 1876, at 11.20 A. M. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' a certified copy of which has been introduced in evidence in this case with the deposition
300 of General Barnes, and marked 'Plaintiff's Exhibit Order of Cancellation,' and state whether that order was signed by you."

Objected to as irrelevant, immaterial and incompetent and not within the issues. Objection overruled by said Judge. To which defendant's attorney then and there excepted.

"A. This motion was made in the District Court before me. The order produced seems, from its endorsement, to be taken from the files of the Court, and I recognize my signature to it. This notice of

motion appears to have been taken from the files of 301
the Court. I cannot prove that. The motion was made before me and I believe argued at the same time of the proceeding.

Q. 4. Will you please look at the paper now shown you endorsed '563 U. S. District Court, District of California; *In re* Erwin Davis in Bankruptcy; Notes of argument on motion to cancel proofs of debt and to dimiss specifications of opposition of P. B. Cornwall and H. P. Wakelee, filed July 20, 1876, Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' which document has been identified by Southard Hoffman, Esquire, Clerk of this Court, in his deposition in this matter, and marked for identification 'Plaintiff's Exhibit Notes,' and state whether the 302
same is in your handwriting?"

Same objection, ruling and exception.

"A. I have no present recollection of the authorities that were cited to me upon that argument, but I recognize my handwriting. These notes were taken by me undoubtedly at the time; that is to say, I have no doubt it was at the time, because they could not have been taken otherwise. I have no recollection of it, but I recognize my handwriting. I find that these notes were filed and duly endorsed among the records of the Court.

Q. 5. Can you say from the memorandum made by you who appeared before you in the argument?" 303

Same objection, ruling and exception.

"A. I find here Colonel Hoge, a present Judge of the Superior Court of this city and county, noted as counsel on one side and Mr. Naphtaly as the other. I presume that they must have appeared. I have no doubt of it. I have no doubt that they represented the respective parties, but I have no recollection of the matter.

Q. 6. Are you able to say that authorities were cited by Judge Hoge on the argument, refreshing

304 your recollection, by the paper now in your hands and above referred to?"

Same objection, ruling and exception.

"A. I have no recollection, refreshed or otherwise, but I observe that this is in my handwriting, and I have no doubt, from seeing my memorandum here, that those authorities were cited, but I cannot say that it refreshes my recollection, because my recollection is absolutely a blank on the subject. It is only as to this paper that I testify to, and my recollection of my own handwriting, together with the file on the face of this memorandum as it appears on the records of the Court duly endorsed as 'Notes of
305 Argument.'"

Thereupon the plaintiff's attorney offered to read the deposition of ROBERT THOMPSON, whose deposition was taken on behalf of Erwin Davis in the suit in equity, to which the defendant's attorney objected on the ground that it was irrelevant, immaterial and incompetent and not concerning any matter within the issues, and the said Judge overruled the said objection, to which the defendant's attorney then and there excepted.

Thereupon the plaintiff's attorney read the said deposition, and the following proceedings were had thereon as to each question asked the defendant's attorney objected on the ground that it was irrele-
306 vant, immaterial and incompetent, and not within the issues, and the said Judge, as to each question, overruled said objection, and thereupon, as to each question, the defendant's attorney then and there noted an exception.

The whole of said deposition as read is here given:

"Q. 1. State your name, age, place of residence, and occupation?

A. My name is Robert Thompson. My age, sixty-seven years. I reside in San Francisco, and am by occupation an attorney at law.

Q. 2. How long have you been such attorney? 307
A. About thirty years.
Q. 3. In this State?
A. Yes, sir.
Q, 4. Did you know Pierre B, Cornwall?
A. No, sir; I did not know Mr. Cornwall.
Q. 5. Did you know H. P. Wakelee?
A. Yes, sir.
Q. 6. In or about the year 1869, and subsequent thereto?
A. Yes, sir; I knew him before that, and afterwards.
Q. 7. Were you acquainted with Erwin Davis about those times?
A. I was. 308
Q. 8. Did you act for him in any capacity: if so, what?

Objected to as irrelevant, immaterial and incompetent. Objection overruled. Exception.

A. I did. I acted as his attorney in the bankruptcy proceeding in the United States District Court for the District of California.
Q. 9. At what time?

Same objection, ruling and exception.

A. My first consultations with him were, I think, in the first part of 1869. The petition was filed in September, 1869. I was first employed by him in 309
the matter at least six months before the filing of this petition.
Q. 10. You remained his attorney through all those bankruptcy proceedings?

Same objection, ruling and exception.

A. I did.
Q. 11. Do you remember proceedings had in that matter wherein Pierre B. Cornwall and Henry P. Wakelee filed specifications of opposition to the discharge of Davis, and objection was made thereto on

310 the part of Mr. Davis in the contest which ensued thereon.

Same objection, ruling and exception.

A. I do.

Q. 12. Who acted with you as attorney for the bankrupt in those proceedings, if any one?

Same objection, ruling and exception.

A. After about 1875, and when we were about to proceed with the petition for Davis' discharge. Judge Caleb Dorsey, from Tuelumne County, and Joseph P. Hoge were associated with me in the matter for Mr. Davis.

311 Q. 13. Were you present at the argument which ensued upon the motion to strike out those oppositions?

Same objection, ruling and exception.

A. I was.

Q. 14. Will you state, as nearly as you can, what was said by counsel for the bankrupt in the argument of that question?

Same objection, ruling and exception.

A. Do you mean the language they used?

Q. 15. Yes; the language that was used?

Same objection, ruling and exception.

312 A. No, sir; I couldn't do that.

Q. 16. Well, will you give us to the best of your recollection, the language that was used—the arguments used?

Same objection, ruling and exception.

A. I can give you the general purport—but I couldn't remember the language used.

Q. 17. Well, give it?

To this question the defendant's attorney specifically objected, upon the ground that the gist or substance of what occurred is called for,

and that the witness should testify to the argument, and that this objection was in addition to the objections heretofore mentioned. Whereupon the said Judge overruled the said objection, and the defendant's attorney then and there excepted. 313

A. There were four oppositions filed to Mr. Davis' discharge by four different individuals. One by Mr. Cornwall, one by Mr. Wakelee, another by E. A. Head, and the fourth by James G. Fair; Joseph Naphtaly, who has testified in this case, was the attorney connected with the opposition in each one of the four cases. When the oppositions were filed I examined into them, and moved to set aside three out of the four, on different grounds; but the 314
grounds of the Wakelee and Cornwall opposition were the same. The four specifications of opposition were identically alike; one seemed to be copied from the other verbatim. The Wakelee and Cornwall oppositions I moved to set aside on the ground that they had obtained a judgment in the District Court of the State of California, after the petition in bankruptcy had been filed, and that that judgment stood of record, the ground appearing in the paper itself. I drew it myself, and filed it. I based the motion on a case decided by Judge Lowell in Massachusetts, found reported in the Fifth Bankruptcy Register, I think, on page 353, being entitled *in re* Garrison *et al.*, which was to the effect that a party 315
having proved his debt in bankruptcy, and subsequently going into a State Court and obtaining a judgment, could not file opposition, or was not entitled to file and be heard in opposition to the bankrupt's discharge, unless he filed a stipulation that he would abide by a decision of the United States Courts on the question of discharge; but if he filed that stipulation, that he would discharge the judgments in case the bankrupt obtained his discharge in the United States Courts, that he would allow them to remain. As I viewed the case at the time, it was to compel them to choose

316 between remaining in the United States Court and depending upon defeating Mr. Davis in his discharge or to get out of the United States Court and take their chances in the State Court under that judgment. As they had filed with their opposition no stipulation to satisfy their judgments in the State Court, in my view they had no standing in the bankruptcy court, and could not have unless the Court permitted them afterwards to file such stipulation. No such stipulation was ever filed. On the hearing of my petition to dismiss their opposition and cancel their debt, Judge Hoge made the principal argument on the part of Mr. Davis. Mr. Dorsey read the stipulation as to facts, which stipulation has
317 already been introduced in evidence herein, and I think made some short argument. General Barnes and Mr. Naphtaly argued it on the other side. The facts covered by the stipulation were all conceded. There was no controversey as to facts. The question before the Court was simply a legal question growing out of these facts. The question was an unsettled question, even under the old bankrupt acts before that of 1867. Some of the courts had held that judgments obtained on old debts that existed at the time of the filing of the petition in bankruptcy, on which judgments had been obtained, were discharged by a discharge in bankruptcy, and others had held the reverse, and the same was true
318 under the act of 1867, at that time. Judge Hoffman in those cases held that they were not discharged, and therefore dismissed the oppositions.

Q. 18. Was there any argument upon that hearing with regard to the validity of the judgments in the State Court independent of the bankrupty proceedings?

Same objection, ruling and exception.

A. I remember nothing of the kind. I do not think the question was raised at all before the Court. I have no recollection of its being alluded to.

Q. 19. I will ask you, then, was the question

raised by the attorneys for H. P. Wakelee or by the 319
attorneys for the bankrupt, as to whether these judgments were valid or invalid in the State Court, independent of the bankruptcy proceedings?

Same objection, ruling and exception.

A. I have no recollection of the validity of the judgments having been referred to in that argument. It was not a contested point in the case as far as I recollect. My impression is that the validity of the judgments was assumed by all parties and by the Court.

Q. 20. If that question had been raised and argued you would have been likely to recollect it now, 320
wouldn't you?

Same objection, ruling and exception.

A. Oh, yes, I recollect every point that was made in the case.

Q. 21. What makes you think that the validity of the judgements was assumed, as you say, by all parties?

Same objection, ruling and exception.

A. Merely the fact that I do not remember that it was argued at all or alluded to.

Q. 24. At the time of the decision of that contest with regard to striking out the opposition of Corn- 321
wall and Wakelee, was anything said by their attorneys with regard to that decision, and with regard to whether they would appeal from it or otherwise; if so, what?

Same objection, ruling and exception.

A. There was some conversation. I had a conversation with Mr. Naphtaly, and he said they were perfectly satisfied with the order of Judge Hoffman.

Q. 25. Do you think of anything else pertaining

322 to the issues in this case which you have omitted? If so, please state?

Same objection, ruling and exception.

A. I don't think of anything else."

Thereupon the plaintiff's attorney offered to read notice of motion to vacate judgment. Whereupon the defendant's attorney objected to the same as immaterial, incompetent, irrelevant and inadmissible, and on the ground that it was entirely subsequent to the judgment, and the said Court overruled the said objection. Whereupon the defendant's attorney then and there excepted.

323 The said notice of motion to vacate judgment is printed as a part of Exhibit Transcript.

Thereupon the plaintiff's attorney offered to read a certain injunction granted in this Court in favor of Angelica Wakelee against the said Erwin Davis, defendant. Whereupon defendant's attorney objected thereto as irrelevant, immaterial and incompetent. Whereupon the said Judge overruled said objection; to which the defendant's attorney then and there noted an exception. The said injunction reads as follows:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to ERWIN DAVIS, his heirs, executors, administrators, assigns, attorneys, agents and

324 servants. GREETING:

Whereas, it has been represented to us in our Circuit Court of the United States for the Southern District of New York in the Second Circuit, on the part of Angelica Wakelee, complainant, that she has lately exhibited her bill of complaint in our said Circuit Court for the Southern District of New York against you, the said Erwin Davis, to be relieved touching the matters therein complained of: in which bill it is stated amongst other things that you are threatening and intending to injure the said complainant touching the matters set forth in the

said bill, and that your actings and doings in the 325
premises are contrary to equity and good conscience,

We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command and perpetually enjoin you the said Erwin Davis, your heirs, executors, administrators, assigns, attorneys, agents and servants, and each and every of you, under the pains and penalties which may fall upon you and each of you in case of disobedience, that you do absolutely forthwith and forever desist and refrain from claiming, alleging or setting up by answer, demurrer, plea or other defense, or declaration, complaint, bill of complaint, reply, replication or in any other 326
manner or form in any action at law or suit in equity or in any other proceeding whatever, in this or any other jurisdiction and from in any manner or form whatsoever and wheresoever maintaining against the complainant Angelica Wakelee, her heirs, executors, administrators and assigns, or any or either of them, that the judgment given, made or entered by and in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, on the eighteenth day of November, 1873, in an action wherein Henry P. Wakelee was plaintiff and said Erwin Davis was defendant, in favor of said Henry P. Wakelee and against said Erwin Davis for the sum in United 327
States gold coin of twenty-two thousand seven hundred and sixty $\frac{36}{100}$ dollars with interest thereon from said date, till paid, at the rate of seven per cent. per annum, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, was not duly given, made or entered by a court having competent jurisdiction thereof, is not valid or does not still stand of record in said District Court, and is not in full force against the defendant Erwin Davis, his heirs, executors, administrators and assigns or any and every of them pursuant to the prayer of said bill of complaint.

328 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New York, in the said District, this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
[L. S.] Clerk.

ANSON MALTBY,
Solicitor for Complainant.

Whereupon the plaintiff's attorney made a calculation of principal and interest due under said judgment of the Supreme Court of California, and found the amount to be $50,096.73.

329 Whereupon the plaintiff's attorney then and there closed the plaintiff's *prima facie* case.

DEFENDANT'S CASE.

Mr. Thaddeus D. Kenneson, defendant's attorney, thereupon opened the case for the defendant, and offered in evidence a certified copy of the certificate of final discharge of Erwin Davis as a bankrupt. Whereupon the said Judge admitted said certificate
330 in evidence.

The said certificate reads as follows:

IN THE DISTRICT COURT OF THE UNITED STATES 331

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER OF ERWIN DAVIS, a Bankrupt.	No. 563, in Bankruptcy.

In this matter the petition of Erwin Davis, the bankrupt herein, for his final discharge herein, be- 332
ing heretofore, to wit, on the 18th day of January, A. D. 1876, brought on for hearing, and ten days having been given to creditors to file specifications of opposition, and further time having been given by stipulation, to wit, to and including the 23d day of February, A. D. 1876, in which to file such opposition, and the time having fully expired and no one excepting E. A. Head, H. P. Wakelee, James G. Fair and P. B. Cornwall having filed specifications of opposition to said bankrupt's discharge, and the specifications of the said E. A. Head, H. P. Wakelee and P. B. Cornwall having been dismissed and set aside by order of this Court, duly made and entered, to wit: The opposition of E. A. Head on 333
the 28th day of April, A. D. 1876; the opposition of the said H. P. Wakelee and P. B. Cornwall on the 31st day of October, 1876, and the specifications of opposition of James G. Fair having been duly referred to Samuel J. Clark, Jr., Esq., one of the Registers of this Court in Bankruptcy, to take the proofs therein and report to this Court thereon, and the said Register having taken the proofs therein and having reported to this Court on the same, and the matter having been fully argued and submitted to the Court for consideration and decision, and the Court, after duly considering the same, finds the said specifi-

334 cations of opposition of James G. Fair to the discharge of the said bankrupt not sustained.

Now, therefore, on motion of R. Thompson, of counsel for said Erwin Davis, bankrupt, as aforesaid, it is hereby

Ordered, adjudged and decreed, that the specifications of opposition of James G. Fair aforesaid, be and the same are hereby overruled and dismissed, and that the default of all the creditors of said bankrupt who failed to file specifications of opposition be and the same is hereby entered, and on further motion of counsel for said bankrupt, and it appearing from the certificate of Samuel J. Clark, Jr., Esq., Register of this Court in Bankruptcy
335 aforesaid, that the assent of at least one-fourth of the creditors of said bankrupt in number and at least one-third in value to whom he, the said bankrupt, is liable as principal debtor, and who have proved their claims in accordance with the provisions of the Bankrupt Act, have assented in writing, which said written assent is now on file herein to the discharge of the said bankrupt as prayed for;

It is further hereby ordered, adjudged and decreed, that this Court do grant, and it hereby does adjudge, decree and grant to the said Erwin Davis a discharge from all his debts, except as in said Act provided; and it is further ordered, adjudged and decreed that a certificate of such discharge, under the seal of this
336 Court in due form, be immediately signed by the Judge of this Court, and given to the said bankrupt.

OGDEN HOFFMAN,
Dist. Judge.

(Endorsed)--Filed March 6, 1877, at 2.25 P. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.

I, Southard Hoffman, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a

full, true and correct copy of the "order overruling 337
and dismissing opposition of James G. Fair, and granting discharge," filed March 6, 1877, at 2.25 P. M., in the matter entitled "In the Matter of Erwin Davis, a Bankrupt," No. 563, in the United States District Court, Northern District of California, and now remaining on file and of record in my office.

Attest my hand and seal of said District Court this 18th day of December, A. D. 1889.

SOUTHARD HOFFMAN,
[L. S.] Clerk.
By A. D. GRIMWOOD,
Deputy Clerk.

338

Whereupon the defendant's attorney requested the Court to direct a verdict for the defendant Erwin Davis, and the plaintiff's attorney requested the Court to direct a verdict in the sum named in favor of the plaintiff and against the defendant. Decision upon said motions was reserved by the said Judge, and the case was adjourned to October 20th, 1892, at 11 A. M.

Whereupon, on October 20, 1892, argument on said motions was resumed, and in the course of said argument the attention of the Court was called to the fact that the interest on October 20, 1892, together with the principal, amounted to $50,100.53.

Whereupon the said Judge granted the plaintiff's 339
motion and directed the jury to render a verdict for the plaintiff for $50,100.53.

Whereupon the defendant's attorney excepted to such direction.

Whereupon the said Judge denied the motion of the defendant's attorney to direct a verdict in favor of the defendant, and the defendant's attorney then and there duly excepted to such denial.

Thereupon the said jury, pursuant to said direction, rendered a verdict in favor of the plaintiff and against the defendant in the sum of $50,100.53.

This bill of exceptions contains all the evidence

340 given upon the trial of every kind, and is a record of all proceedings thereon.

And inasmuch as the said matters produced and given in evidence on the said trial and the said exceptions do not appear by record of the said cause in the Circuit Court of the United States for the Southern District of New York, the defendants have prepared and caused to be settled this bill of exceptions as a record thereof, in accordance with the Statutes of the United States, which said bill of exceptions the said Court hereby signs and orders on file this 28th day of December, 1892.

N. SHIPMAN,
Circuit Judge.

341

(Endorsed)—U. S. Circuit Court, So. Dist. of New York.—Angelica Wakelee against Erwin Davis. Bill of Exceptions.—Logan, Clark & Demond, Attys. for Deft., 58 William St., N. Y.—U. S. Circuit Court.—Filed Jan. 4, 1893.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

342 ANGELICA WAKELEE,
Plaintiff and Defendant in Error,

AGAINST

ERWIN DAVIS,
Defendant and Plaintiff in Error.

ASSIGNMENT OF ERRORS.

The defendant and plaintiff in error, Erwin Davis, by his attorneys, Logan, Clark & Demond, pursu-

ant to the rules and practice of the Courts of the 343
United Statest hereby assigns the following errors committed in this cause, and says that in the record and proceedings herein there are manifest errors in this, to wit:

I.

The Court erred in denying the defendant's motion to compel the plaintiff to elect on which of the four counts in her complaint she would go to trial and in holding that she could go to trial on all four counts.

II.

The Court erred in admitting in evidence the judgment roll and transcript on appeal in the suit 344
brought by Henry P. Wakelee against Erwin Davis in California, and in holding that the same was evidence for any purpose against the defendant upon the issues herein.

III.

The Court erred in admitting in evidence the whole transcript of said record last mentioned, instead of simply admitting the judgment roll.

IV.

The Court erred in admitting in evidence the deposition of Southard Hoffman, and in holding that the same was evidence for any purpose against the 345
defendant upon the issues herein.

V.

The Court erred in admitting the answers to the following questions put to the said Southard Hoffman, in said deposition: Questions 3, 4, 5 and 6, the substance of his testimony being with respect to certain papers on file in the matter of the bankruptcy of the defendant, and in holding that said answers were evidence against the defendant for any purpose upon the issues herein.

346 VI.

The Court erred in admitting in evidence the "Plaintiff's Exhibit Facts," and in holding that said exhibit was evidence for any purpose against the defendant upon the issues herein.

VII.

The Court erred in admitting in evidence "Plaintiff's Exhibit Notes," and in holding that said exhibit was evidence for any purpose against the defendant upon the issues herein.

VIII.

347 The Court erred in admitting in evidence the deposition of W. H. L. Barnes, and in holding that said deposition was any evidence whatsoever against the defendant upon the issues herein.

IX.

The Court erred in admitting the answers to the following questions put to the said W. H. L. Barnes in said deposition, to wit: Questions 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46, said answers and testimony being in substance with respect to the proceedings in bankruptcy taken by the defendant in California; the
348 application made by Henry P. Wakelee for leave to sue the defendant; with respect to the papers and order on said application; with respect to the opposition of Henry P. Wakelee to the discharge of the defendant in bankruptcy and the papers thereon; with respect to the defendant's proceedings to set aside the opposition of Henry P. Wakelee to the defendant's discharge in bankruptcy and the papers thereon; with respect to what was said on the motion before Judge Hoffman to set aside the opposition of Henry P. Wakelee to the defendant's discharge in bankruptcy; with respect to the acquiescence of Henry P. Wakelee in Judge Hoffman's

order thereon, and why no appeal was taken there- 349
from; with respect to the proceedings taken on the California judgment; with respect to consultations between the said Henry P. Wakelee and his counsel, and with respect to foreign suits upon the said California judgment against the defendant; and the Court erred in holding that said answers were evidence for any purpose against the defendant upon the issues herein.

X.

The Court erred in admitting in evidence "Plaintiff's Exhibit Leave," and in holding that said exhibit was evidence for any purpose against the defendant upon the issues herein. 350

XI.

The Court erred in admitting in evidence "Plaintiff's Exhibit Opposition," and in holding that the said exhibit was evidence for any purpose against the defendant upon the issues herein.

XII.

The Court erred in admitting in evidence "Plaintiff's Exhibit Petition to Dismiss," and in holding that said exhibit was any evidence whatsoever against the defendant for any purpose upon the issues herein.

XIII. 351

The Court erred in admitting in evidence the order of Judge Hoffman granting the motion to dismiss the opposition of Henry P. Wakelee, and in holding that said order was evidence for any purpose against the defendant upon the issues herein.

XIV.

The Court erred in admitting in evidence the deposition of Joseph Naphtaly, and in holding that said deposition was evidence for any purpose against the defendant upon the issues herein.

352 XV.

The Court erred in admitting in evidence the answers to the following questions in said deposition put to Joseph Naphtaly, to wit: questions 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33 and cross-questions 12, 2, 3 and 4 and redirect question 9; said answers being in substance with respect to the bankruptcy proceedings of the defendant in California; with respect to the application of Henry P. Wakelee for leave to sue the defendant; with respect to Henry P. Wakelee's opposition to the defendant's discharge in bankruptcy and the papers thereon; with respect to the proceedings for setting aside
353 the opposition of Henry P. Wakelee to the defendant's discharge in bankruptcy and the papers thereon; with respect to what occurred and was said at the argument of the motion to set aside said opposition; with respect to the order thereon and acquiescence of Henry P. Wakelee therewith and his satisfaction thereat; with respect to the state of mind and the opinions of the said Henry P. Wakelee and his counsel as to the validity of the judgment in the California Court, and the Court erred in holding that said answers were evidence against the defendant for any purpose upon the issues herein.

354 XVI.

The Court erred in admitting in evidence the deposition of Ogden Hoffman, and in holding that said deposition was evidence against the defendant upon the issues herein.

XVII.

The Court erred in admitting in evidence the answers to the following questions in said deposition of said Ogden Hoffman, to wit: questions 3, 4, 5 and 6, which questions were in substance with respect to the action of the said Ogden Hoffman upon the

argument of the motion to dismiss the opposition of the said Henry P. Wakelee; with respect to the 355
proceedings on said motion and the papers thereon, and in holding that said answers were evidence against the defendant for any purpose upon the issues herein.

XVIII.

The Court erred in admitting in evidence the deposition of Robert Thompson, and in holding that said deposition was evidence for any purpose against the defendant upon the issues herein.

XIX.

The Court erred in admitting in evidence the 356
answers to the following questions put in the said deposition to the said Robert Thompson, to wit: Questions 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24 and 25, which answers in substance were with respect to the relations between the defendant and the said Robert Thompson; with respect to the bankruptcy proceedings of the defendant in California; with respect to the opposition proceedings of Henry P. Wakelee to the discharge of the defendant from bankruptcy; with respect to the argument of the defendant's motion to dismiss the opposition of Henry P. Wakelee to the defendant's discharge in bankruptcy; with respect to what was 357
said upon the argument of said motion and with respect to matters connected with an appeal from the order thereon, and in holding that said answers were any evidence against the defendant upon the issues herein.

XX.

The Court erred in admitting in evidence the injunction granted in this Court in favor of the plaintiff against the defendant, and in holding that said injunction was any evidence against the defendant for any purpose upon the issues herein.

358

XXI.

The Court erred in holding that the defendant was estopped from denying the jurisdiction and validity of the judgment recovered against him in California by Henry P. Wakelee, and in holding that there was any evidence adduced by the plaintiff sufficient to constitute an estoppel.

XXII.

The Court erred in directing a verdict for the plaintiff, and in holding that there was no evidence upon which the defendant could recover.

XXIII.

359

The Court erred in refusing to direct a verdict in favor of the defendant, and in holding that the defendant was not entitled to judgment.

XXIV.

The Court erred in admitting testimony as to what was said on the argument of the motion before Judge Hoffman to dismiss the opposition of Henry P. Wakelee to the discharge of the defendant in bankruptcy.

XXV.

The Court erred in not holding that the defendant's discharge in bankruptcy was a bar to the
360 plaintiff's alleged cause of action.

XXVI.

The Court erred in holding that the defendant asserted the validity of the California judgment recovered by Henry P. Wakelee as the only ground for dismissing his opposition to the defendant's discharge in bankruptcy.

XXVII.

The Court erred in holding that the defendant's discharge in bankruptcy did not discharge the judgment upon which the recovery herein is based.

XXVIII. 361

The Court erred in not holding that, inasmuch as the defendant's motion before Judge Hoffman to dismiss the opposition of Henry P. Wakelee to his discharge in bankruptcy was based upon several grounds, the Court therefore could not determine that Judge Hoffman, in granting the order dismissing said opposition acted upon the single ground, to wit, defendant's affirmation of the validity of the judgment in California, which is the basis of this action.

Wherefore, the defendant and plaintiff in error prays that the judgment of the Circuit Court of the United States for the Southern District of New 362
York in favor of the plaintiff and against the defendant be reversed.

Dated New York, January 7, 1893.

LOGAN, CLARK & DEMOND,
Attorneys for Defendant and Plaintiff
in Error,
58 William Street,
New York City.

(Endorsed)—U. S. Circuit Court, So. Dist. of New York.—Angelica Wakelee, Plff. and Deft. in Error against Erwin Davis, Deft. and Plff. in Error.—Assignment of Errors.—Logan, Clark & Demond, Attys. for Deft. Davis, 58 William St., New York.—U. S. Circuit Court, Filed Jan. 13, 363
1893.—John A. Shields, Clerk.

364 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Second Circuit.

ERWIN DAVIS, Plaintiff in Error, AGAINST ANGELICA WAKELEE, Defendant in Error.	Bond for Damages and Costs.

365 KNOW ALL MEN BY THESE PRESENTS, that we, Erwin Davis, of the City, County and State of New York, as principal, and Emily B. Davis, of said City, County and State, and Charles E. Phelps, of Bayshore, Long Island, N. Y., as sureties, are held and firmly bound unto the above named Angelica Wakelee in the sum of ninety thousand ($90,000) dollars, to be paid to the said Angelica Wakelee, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severely, firmly by these presents. Sealed with our seals and dated the 11th day of January, in the year of our Lord one thousand eight hundred and ninety-
366 three.

Whereas the above named Erwin Davis has prosecuted a writ of error to the United States Circuit of Appeals for the Second Circuit to reverse the judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York;

Now, therefore, the condition of this obligation is such that if the above named Erwin Davis shall prosecute his said writ of error, to effect and answer all damages and costs if he shall fail to make his said writ of error good, then this obligation shall be

void, otherwise the same shall be and remain in full force and virtue, 367

ERWIN DAVIS. [L. S.]
EMILY B. DAVIS. [L. S.]
CHARLES E. PHELPS. [L. S.]

City, County and State of New York, ss.:

On this 11th day of January, 1893, before me, a Notary Public in and for the City and County of New York, personally appeared the above named Erwin Davis and Charles E. Phelps, and on the 12th day of January, 1893, the above name Emily B. Davis, to me personally known and known to me to be the individuals who executed the foregoing bond, and severally acknowledged to me that they had ex- 368
ecuted the same for the uses and purposes therein set forth.

F. H. KNIGHT.
[L. S.] Notary Public,
New York County.

City, County and State of New York, ss.:

EMILY B. DAVIS, being duly sworn, says: I reside in the City, County and State of New York, and am a freeholder therein, and my place of residence is at 121 Madison avenue, New York City. I am the wife of the within named Erwin Davis, and am worth the sum of two hundred and ten thousand dollars over and above all my debts and liabibities, and ex- 369
clusive of property except from levy and sale under an execution. The property above mentioned stands in my own name and is absolutely my own, and is in no way controlled by my said husband, and I signed this bond willingly and without any fear of or control on the part of my said husband.

EMILY B. DAVIS.

Sworn to before me this 12th day of January, 1893.

F. H. KNIGHT,
[L. S.] Notary Public,
New York Co.

370 City, County and State of New York, ss.:

CHARLES E. PHELPS, being duly sworn, says: I reside at Bayshore, L. I. in the State of New York, and am a freeholder therein; I am worth the sum of two hundred and ten thousand dollars over and above all debts and liabilities, and exclusive of property exempt from levy and sale under execution.

CHARLES E. PHELPS.

Sworn to before me this 11th day of January, 1893.

F. H. KNIGHT,
[L. L.] Notary Public,
New York County,

371 (Endorsed)—U. S. Circuit Court So. Dist. of N. Y.—Erwin Davis, Plff. in Error, against Angelica Wakelee, Deft. in Error.—Bond for Damages and Costs.—Logan, Clark & Demond, Attys. for Davis, 58 William Street, New York.—The within Bond Approved Jan. 12, 1893.—E. H. Lacombe.—U. S. Circuit Court.—Filed Jan. 13, 1893.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

ERWIN DAVIS,
Defendant and Plaintiff in
372 Error,

AGAINST

ANGELICA WAKELEE,
Plaintiff and Defendant in
Error.

City and County of New York, ss.:

MARX E. HARBY, being duly sworn, says: That he is of the age of twenty-one years and upwards, and

that on the 13th day of January, 1893, at 48 Wall 373
street, in the City of New York, State of New York, he served a copy of the annexed citation on Anson Maltby, attorney for the plaintiff and defendant in error in this action by delivering a copy of the same on him personally, leaving the same with him and exhibiting to him the Judge's signature of the original thereof; and he says that he knows the person so served as aforesaid to be the attorney for Angelica Wakelee, the person mentioned and described in said citation as the plaintiff and defendant in error in this action.

MARX E. HARBY.

Sworn to before me this 13th day of January, 1893. 374

F. H. KNIGHT,
Notary Public,
New York County.

[SEAL.]

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ERWIN DAVIS,
Defendant and Plaintiff in Error,

AGAINST 375

ANGELICA WAKELEE,
Plaintiff and Defendant in Error.

UNITED STATES OF AMERICA, ss.:

TO ANGELICA WAKELEE, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Second Circuit, to be holden in the

376 City of New York on the 10th day of February, 1893, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Erwin Davis is plaintiff in error and you are defendant in error to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, January 12, 1893.

E. HENRY LACOMBE,
Judge.

377 (Endorsed)—U. S. Circuit Court, So. Dist. of N. Y.—Erwin Davis, Plff. in Error against Angelica Wakelee, Deft. in Error.—Original Citation and Proof of Service.—Logan, Clark & Demond, Attys. for Davis, 58 William Street, New York. —U. S. Circuit Court.—Filed Jan. 14, 1893.—John A. Shields, Clerk.

U. S. CIRCUIT COURT OF APPEALS, 378

SECOND CIRCUIT.

DAVIS,

Plaintiff in Error,

vs.

CORNWALL,

Defendant in Error.

379

WALLACE, Circuit Judge.

This is a writ of error by the defendant in the Court below to review a judgment for the plaintiff, entered upon the verdict of a jury by the direction of the trial judge. The action was brought upon a judgment recovered by the plaintiff against the defendant December 18, 1892, in the District Court of the Fifteenth Judicial District of the State of California. The defence was that the defendant had duly obtained a discharge from all his debts, including the judgment, by a decree of the United States District Court for the District of California, 380 in a proceeding in bankruptcy.

The ruling of the trial judge in directing a judgment for the plaintiff, proceeded upon the theory that the defendant was estopped from asserting this defence by his conduct in the course of the bankruptcy proceeding. The correctness of this ruling is the principal question presented by the assignments of error.

Whether the defendant was estopped depends upon the following facts: It appeared that after the defendant had been adjudged a bankrupt, the plaintiff, who was then a creditor of the defendants, and had filed a proof of debt, founded upon

various promissory notes made by the defendant, obtained leave of the Court in the bankruptcy proceeding to sue and enforce his demands against the defendant in the courts of the State, and commenced a suit which resulted in the judgment upon which the present action was brought. After the judgment had been rendered the defendant applied in the bankruptcy proceeding for a discharge from his debts, and the plaintiff filed specifications in opposition thereto, setting up the existence of various grounds disentitling the defendant to a discharge. Thereupon the defendant applied to the Court in the bankruptcy proceeding for an order dismissing the specifications of the plaintiff, and canceling the plaintiff's proof of debt. This application was opposed by the plaintiff, but was granted by the Court. The petition on which the application was founded set forth as the only grounds the statement that after the plaintiff had proved his debt and had obtained leave to commence an action in the State Court, he commenced such an action in the Fifteenth Judicial District Court of the State of California, and recovered a judgment against the bankrupt, the defendant therein, and that said judgment still stood of record in the said Court, and was in full force. The plaintiff did not attempt to review the order by a petition of appeal, or otherwise, but acquiesced in the decision.

Inasmuch as the sole basis for the order of the Court in the bankruptcy proceeding was the averment in the petition of the bankrupt that the plaintiff had recovered the present judgment, and that said judgment was in full force, it would seem obvious that the decision embodied in the order canceling the proof of debt and dismissing the specifications must have proceeded upon the ground that the plaintiff, because of his judgment, had no rights or interests to protect in the bankruptcy court. This conclusion could only have been reached upon the view that the plaintiff's judgment could not be affected by a discharge of the defendant in bank-

ruptcy. Manifestly it was the purpose of the petition to induce this view, and the object was accomplished by it. 384

The ruling of the trial judge thus presents the question whether the defendant, after having obtained a decision in the bankruptcy proceeding, precluding the plaintiff from contesting his right to a discharge upon the ground that the discharge could not affect the judgment, can be permitted, when sued upon the judgment, to deny what he then asserted and impeach as erroneous the order which he procured the Court to make, to the prejudice of the plaintiff while retaining its benefit himself. We think this question is settled adversely to 385
the defendant by the recent decision of the Supreme Court in Davis *v.* Wakelee (Sup. Court Rep., Vol. 15, 555). That was a suit in equity brought in the United States Circuit Court for the Southern District of New York by the assignee of Henry P. Wakelee, alleging that she was about to commence an action at law in that court to enforce a judgment recovered by her assignor against the defendant in a California court, and praying for a decree in aid of such action, adjudging the defendant to be estopped from asserting a defence that the judgment was void for want of jurisdiction of the person of the defendant by the court in which it 386
was rendered, and from setting up his discharge in bankruptcy as a defence. The estoppel claimed was predicated of facts precisely similar to those in the present case, viz., the recovery of the judgment by Wakelee after defendant had been adjudicated a bankrupt, and after leave to sue had been granted in the bankruptcy proceeding; the application of the bankrupt for his discharge, and opposition thereto by Wakelee; the application by the defendant in the bankruptcy proceeding for an order cancelling Wakelee's proof of debt, and dismissing his specifications opposing the discharge; and the granting of the order and the acquiescence of Wakelee therein. The petition upon which the order was

387 obtained was identical with that in the present case, except as to the name of the creditor and the date and amount of the judgment. The Circuit Court sustained the bill, and made a decree restraining the defendant from asserting the invalidity of the judgment. That court, however, declined to decide whether the defendant was estopped from pleading his discharge, holding that the complainant could avail herself of any such estoppel in an action at law, and did not need the assistance of a court of equity. Upon an appeal by defendant from this decree, the Supreme Court was of the opinion that the defendant was estopped from claim-
388 ing that the judgment of the California court was void for want of jurisdiction, and affirmed the decree of the Circuit Court. That court, after considering the question whether the complainant could resort to equity or could get the benefit of the estoppel in the action at law, and expressing the opinion that the remedy at law was not so plain or clear as to oust a court of equity of jurisdiction, proceeded to discuss the case upon the merits, and used the following language: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding; and succeeds in maintaining that position, he may not, thereafter, simply because his interests
389 have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." * * * "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it." This decision is controlling,

and renders any discussion of the question now be- 390
fore us superfluous. The appellant attempts to parry the force of the decision by urging that the case then before the Court differed from the pres ent case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding that the judgment was in full force. The Court, however, did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but put its conclusions upon the salutary doctrine of estoppel which prohibits parties from playing fast and loose with courts of justice. Indeed, all the statements in the petition which was the 391
basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the Court was of the opinion that, although the defendant in making them was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and by conclusive presumption could not have been misled by the defendant's statement, that the judgment was in full force, when, in fact, it was a nullity because of want of jurisdiction of the Court which rendered it. He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal 392
rights by a judicial tribunal to his disadvantage and for the benefit of the defendant; and if he chose to acquiesce, the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong.

The assignments of error impugn the rulings of the trial judge in admitting in evidence the arguments made by counsel in the bankruptcy proceeding upon the application for the order cancelling the plaintiff's proof of debt, and dismissing the specifications. It may be that the statements made on that occasion by the counsel for the defendant ought

393 not to be imputed to and used as the representations of the defendant to the Court. However this may be, the arguments were admissible for the purpose of showing what question was before the Court; and in any event the admission of the evidence was innocuous, because, as we have shown, it was obvious from the petition itself that the order proceeded upon the grounds that the plaintiff's judgment could not be affected by a discharge of the defendant in bankruptcy, and the trial judge would have been justified in so ruling without looking further.

We conclude that there was no error in the rul-
394 ings of the trial judge, and that the judgment should be affirmed.

(Endorsed): U. S. Cir. Ct. of Appeals, Second Cir.—Davis, Plff., in Error, *v.* Cornwall, Deft., in Error.—Opinion, Wallace, Cir. Judge.—United States Circuit Court of Appeals, Second Circuit. —Filed May 28, 1895.—JamesC Reed, Clerk.

395

U. S. CIRCUIT COURT OF APPEALS, 396

FOR THE SECOND CIRCUIT.

Term 1895.

ERWIN DAVIS,

Plaintiff in Error,

against

ANGELICA WAKELEE,

Defendant in Error. 397

Please take notice, that, at his Chambers, at the Post Office Building, in the City of New York, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, on the 3d day of June, 1895, a motion will be made on the part of the defendant in error, before the Hon. E. Henry Lacombe, Circuit Judge, that the annexed order be entered herein, and for such other, further and different order or relief as to the Court may seem just. 398

Dated New York, May 29th, 1895.

ANSON MALTBY,
Attorney for Defendant in Error,
48 Wall St., N. Y.

To

Messrs. LOGAN, CLARK & DEMOND,
Attorneys for Plaintiff in Error,
58 William Street, N. Y.

399 U. S. CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Term 1895.

ERWIN DAVIS,

Plaintiff in Error,

against

ANGELICA WAKELEE,

400 *Defendant in Error.*

Error to the Circuit Court of the United States for the Southern District of New York.

This case came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here

Ordered and adjudged, that the judgment of the said Circuit Court be, and the same is, hereby affirmed, and that the mandate of this Court issue
401 to the said Circuit Court for the Southern District of New York, directing entry of judgment of affirmance accordingly.

Dated New York, June 5, 1895.

W. J. W.,
E. H. L.

Endorsed: United States Circuit Court of Appeals, for the Second Circuit—Erwin Davis, plaintiff in error, against Angelica Wakelee, defendant in error—Order and Notice of Motion—Anson Maltby, attorney for defendant in error, 48 Wall Street, New York City—Service of a copy

402

403

404

notice, at the sum of fifty-seven and 23/100 ($57.23) dollars;

UNITED STATES OF AMERICA,
Southern District of New York.

I, JAMES C. REED, Clerk of
Court of Appeals for the Second
that the foregoing papers, number
contain a true and complete tran
proceedings had in said Court in
Plaintiff in error, vs. Angelica
Error, as the same remain of rec

IN TESTIMONY WHEREOF, I hav
said Court to be hereunto aff
York, in the Southern Distric
(Seal.) Second Circuit, this 9th day
our Lord one thousand eight h
and of the Independence of t
One hundred and twentieth.

James

:A, :
rk. : ss:

of the United States Circuit
cond Circuit, DO HEREBY CERTIFY,
umbered from 1 to 134 inclusive,
transcript of the record and
rt in the case of Erwin Davis,
elica Wakelee, Defendant in
f record and on file in my office

I have caused the Seal of the
affixed, at the City of New
strict of New York, in the
day of October in the year of
ght hundred and ninety-five,
of the said United States, the
h.

mes C. Reed,
CLERK.

399 U. S. CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Term 1895.

ERWIN DAVIS,

Plaintiff in Error,

against

ANGELICA WAKELEE,

400 *Defendant in Error.*

Error to the Circuit Court of the United States for the Southern District of New York.

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401 to the said Circuit Court for the Southern District of New York, directing entry of judgment of affirmance accordingly.

Dated New York, June 5, 1895.

W. J. W.,
E. H. L.

Endorsed: United States Circuit Court of Appeals, for the Second Circuit—Erwin Davis, plaintiff in error, against Angelica Wakelee, defendant in error—Order and Notice of Motion—Anson Maltby, attorney for defendant in error, 48 Wall Street, New York City—Service of a copy

of within order and notice is hereby admitted 402
—New York, May 29th, 1895—Logan, Clark & Demond, attorneys for plaintiff in error—United States Circuit Court of Appeals, Second Circuit—Filed June 6th, 1895—James C. Reed, Clerk.

UNITED STATES OF AMERICA, ss.:

The President of the United States of America,

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York. 403

[SEAL.]

GREETING:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between Angelica Wakelee, plaintiff, and Erwin Davis, defendant, wherein the judgment of the said Court is in words and figures following, viz.:

"This action having come on to be tried in its regular order on the calendar, before the Honorable Nathaniel Shipman, judge and a jury, at a stated term of the Circuit Court of the United States of America for the Southern District of New York, in 404
the Second Circuit, at the United States Circuit Court room, in the City of New York, on the 19th and 20th days of October, 1892; and the counsel for the plaintiff having moved that a verdict be directed in favor of the plaintiff upon the pleadings herein and upon the evidence produced upon the trial; and the jury having found a verdict for the plaintiff and against the defendant, under direction of the Court, in the sum of fifty thousand one hundred dollars and fifty-three cents ($50,100.53), and the costs of the plaintiff having been duly taxed, on notice, at the sum of fifty-seven and 23/100 ($57.23) dollars;

405 Now, on motion of Anson Maltby, Esquire, attorney for the plaintiff, it is adjudged that said plaintiff, Angelica Wakelee, have judgment upon the merits against the defendant, Erwin Davis, in the sum of fifty thousand seven hundred and thirty-five and 13/100 ($50,735.13) dollars, being the amount of said verdict and interest thereon to this day, and that said plaintiff recover of Erwin Davis, the defendant, the sum above named, together with the sum of fifty-seven 23/100 ($57.23) dollars, her costs as adjusted, amounting together to the sum of fifty thousand seven hundred and ninety-two and 36/100 ($50,792.36) dollars, and that she have exe-
406 cution therefor.

Judgment signed this 5th day of January, 1893.

JOHN A. SHIELDS,
Clerk."

as by the inspection of the transcript of the record of the said court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in
407 the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now by the Court,

Ordered and adjudged that the judgment of the said Circuit Court be, and the same is, hereby affirmed, with costs taxed at the sum of thirty-one dollars and seventy-five cents ($31.75).

June 6, 1895.

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United

States ought to be had, the said writ of error notwithstanding. 408

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES C. REID,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

409

Costs of defendant in error:

Clerk.....	$11.75
Counsel....	20.00
	$31.75

Endorsed:
United States Circuit Court of Appeals
For the Second Circuit.
No. 20, October Term, 1894.

Erwin Davis
against
Angelica Wakelee. 410

Mandate.

United States Circuit Court,
Filed June 8, 1895.

JOHN A. SHIELDS,
Clerk.

UNITED STATES OF AMERICA, :
Southern District of New York. : ss:

I, JAMES C. REED, Clerk of the United States Circuit Court of Appeals for the Second Circuit, DO HEREBY CERTIFY, that the foregoing Pages, numbered from 1 to 134 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Erwin Davis, Plaintiff in error, vs. Angelica Wakelee, Defendant in Error, as the same remain of record and on file in my office

IN TESTIMONY WHEREOF, I have caused the Seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the
Seal.) Second Circuit, this 9th day of October in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States, the One hundred and twentieth.

James C. Reed,
CLERK.

of within order and notice is hereby admitted 402
—New York, May 29th, 1895—Logan, Clark &
Demond, attorneys for plaintiff in error—
United States Circuit Court of Appeals, Second
Circuit—Filed June 6th, 1895—James C. Reed,
Clerk.

UNITED STATES OF AMERICA, ss.:

The President of the United States of America,

To the Honorable the Judges of the Circuit Court
of the United States for the Southern District
of New York. 403

[SEAL.]

GREETING:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between Angelica Wakelee, plaintiff, and Erwin Davis, defendant, wherein the judgment of the said Court is in words and figures following, viz.:

"This action having come on to be tried in its regular order on the calendar, before the Honorable Nathaniel Shipman, judge and a jury, at a stated term of the Circuit Court of the United States of America for the Southern District of New York, in 404
the Second Circuit, at the United States Circuit Court room, in the City of New York, on the 19th and 20th days of October, 1892; and the counsel for the plaintiff having moved that a verdict be directed in favor of the plaintiff upon the pleadings herein and upon the evidence produced upon the trial; and the jury having found a verdict for the plaintiff and against the defendant, under direction of the Court, in the sum of fifty thousand one hundred dollars and fifty-three cents ($50,100.53), and the costs of the plaintiff having been duly taxed, on notice, at the sum of fifty-seven and 23/100 ($57.23) dollars;

UNITED STATES OF AMERICA, :
Southern District of New York, : ss:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States in and for the Second Circuit and Southern District of New York,

DO HEREBY CERTIFY, that I have compared the preceding with the original Mandate in the cause between Angelica Vakalee plaintiff and Erwin Davis defendant on file and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the City of New York, (Seal.) in the District and Circuit above-named, this 9th day of October in the year of our Lord one thousand eight hundred and ninety-five and of our Independence the one hundred and twentieth.

John A. Shields, Clerk.

States ought to be had, the said writ of error notwithstanding. 408

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES C. REID,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

409

Costs of defendant in error:

Clerk.....	$11.75
Counsel....	20.00
	$31.75

Endorsed:
United States Circuit Court of Appeals
For the Second Circuit.
No. 20, October Term, 1894.

Erwin Davis
against
Angelica Wakelee. 410

Mandate.

United States Circuit Court,
Filed June 8, 1895.

JOHN A. SHIELDS,
Clerk.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

ERWIN DAVIS,

Plaintiff in Error,

vs.

PIERRE B. CORNWALL,

Defendant in Error.

TRANSCRIPT OF RECORD.

Error to the Circuit Court of the United States for the Southern District of New York.

PRINTED UNDER THE DIRECTION OF THE CLERK

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United States of America, ss.: 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Pierre B. Cornwall, plaintiff, and Erwin Davis, defendant, a manifest error hath happened, to the great damage of the said Erwin Davis, defendant, as is said and appears by the complaint: 2
We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 10th day of February, 1893, that the record and proceedings aforesaid being inspected, the said Judges of the 3
United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 12th day of January in the year of our Lord one thousand eight hundred and ninety-three,

and of the Independence of the United States the one hundred and seventeenth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. H. LACOMBE.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to 158 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Erwin Davis, plaintiff in error, against Pierre B. Cornwall, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of January in the year of our Lord, one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Endorsed)—The U. S. Circuit Court of Appeals for the Second Circuit.—Erwin Davis, Plaintiff in Error *vs.* Pierre B. Cornwall, Defendant in Error.—Original Writ of Error and Proof of Service.—Logan, Clark & Demond, Attorneys for Plaintiff in Error, 58 William St., N. Y. City.—Due service of a copy of the within Writ of Error is hereby admitted this 13th day of January, 1893.—U. S. Circuit Court.—Filed Jan. 14, 1893.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS 7

FOR THE SECOND CIRCUIT.

ERWIN DAVIS, Plaintiff in Error, AGAINST PIERRE B. CORNWALL, Defendant in Error.	Affidavit of Service.

8

City and County of New York, ss.:

MARX E. HARBY, being duly sworn, says: That he is of the age of twenty-one years and upwards, and that on the 13th day of January, 1893, at 48 Wall street, in the City of New York, State of New York, he served a copy of the annexed writ of error on Anson Maltby, the attorney for the defendant in error in this action, by delivering a copy of the same to him personally, leaving the same with him and exhibiting to him the signature of the justice to the original thereof; and he further says that he knows the person so served as aforesaid to be the attorney for Pierre B. Cornwall, the person mentioned and described in said writ of error. 9

MARX E. HARBY.

Sworn to before me this 13th day of January, 1893,

F. H. KNIGHT,
Notary Public,
New York County.

[SEAL.]

10 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL

AGAINST

ERWIN DAVIS.

TO THE ABOVE NAMED DEFENDANT:

11 You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at the City of New York, this 8th day of January, in the year one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

12 ANSON MALTBY,
Plaintiff's Attorney.
Office and Post Office address,
48 Wall St.,
New York City.

(Endorsed)—United States Circuit Court, Southern District of New York.—Pierre B. Cornwall, Plaintiff, *vs.* Erwin Davis, Defendant.—To the defendant within named.—Take Notice.—That upon default judgment will be taken for the sum of $\$17{,}043\frac{64}{100}$ Dollars in money, with interest at the rate of 7% from the 18th day of December, 1892, besides costs.—Anson Maltby, Plaintiff's Attorney.—I hereby depute E. E.

Noren to serve the within writ.—John W. Jacobus, U. S. Marshal.—N. Y., Jan'y 8th, 1891, S. D. N. Y.—We admit service of the within Summons for Dft. Erwin Davis Apl. 14, 1891.—Kenneson, Crain & Alling, Attys. for Davis.—I certify that the within summons was served as appears by the foregoing admission of service Jul. 7, 1891.—John W. Jacobus, U. S. Marshal.—I hereby depute Wm. T. Smith to serve the within summons.—John W. Jacobus, U. S. Marshal.—N. Y., March 19, 1891.—U. S. Circuit Court.—Filed Jul. 7, 1891.—John A. Shields, Clerk. 13

CIRCUIT COURT OF THE UNITED STATES, 14

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL,
Plaintiff,

VERSUS

ERWIN DAVIS,
Defendant.

The plaintiff complaining of the defendant by this, his amended Complaint, alleges upon information and belief: 15

For the first, separate and distinct cause of action.

I.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

II.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

III.—That on the eighteenth day of December, 1872, the District Court of the Fifteenth Judicial

16 District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

IV.—That on the eighteenth day of December, 1872, in said City and County of San Francisco, this plaintiff, in an action wherein he was plaintiff and this defendant was defendant, recovered a judgment in said court against this defendant by the terms of which judgment it was ordered, adjudged and decreed that said plaintiff have and recover from said defendant, in United States gold coin, the sum of seventeen thousand and three $\frac{52}{100}$ dollars, with in-
17 terest thereon at the rate of seven per cent. per annum from December 18, 1872, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty $\frac{12}{100}$ dollars, amounting in all to seventeen thousand and forty-three $\frac{64}{100}$ dollars ($17,043. 64).

V.—That no part thereof has been paid and the whole amount thereof still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from December 18, 1872.

For a second, separate and distinct cause of action.

18

VI.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

VII.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

VIII.—That on the eighteenth day of December, 1872, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of

general jurisdiction, duly created by the laws of that 19
State.

IX.—That on the eighteenth day of December, 1872, in said City and County of San Francisco, this plaintiff, in an action wherein he was plaintiff and this defendant was defendant, recovered a judgment in said court against this defendant, by the terms of which judgment it was ordered, adjudged and decreed that said plaintiff have and recover from said defendant, in United States gold coin, the sum of seventeen thousand and three $\frac{52}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from December 18, 1872, till paid, together with said plaintiff's costs and disbursements incurred 20
therein, amounting to the sum of forty $\frac{12}{100}$ dollars; amounting in all to seventeen thousand and forty-three $\frac{64}{100}$ dollars ($17,043.64).

X.—That said judgment was duly given, made and entered by said District Court.

XI.—That no part thereof has been paid, and the whole amount thereof still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from December 18, 1872.

For a third, separate and distinct cause of action.

XII.—That plaintiff is a citizen of the State of California, and resides therein in the City of San 21
Francisco.

XIII.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

XIV.—That on the eighteenth day of December, 1872, and for one year previous thereto, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

22 XV.—That on or about the 2d day of August, A. D. 1872, this plaintiff commenced an action in the said Court against the said Erwin Davis, and in the due course of the said action, on the 18th day of December, 1872, obtained a judgment of said Court in his favor and against the said Erwin Davis, which said judgment still stands of record in said District and is in full force.

XVI.—That by the terms of said judgment it was ordered, adjudged and decreed that plaintiff have and recover from said defendant Erwin Davis in United States gold coin the sum of seventeen thousand and three $\frac{52}{100}$ dollars, with interest thereon at
23 the rate of seven per cent. per annum from December 18, 1872, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty $\frac{12}{100}$ dollars, amounting in all to seventeen thousand and forty-three $\frac{64}{100}$ ($17,043.64) dollars.

XVII.—That said judgment was so given and recovered without jurisdiction in said Court of the person of said defendant, who was then a non-resident of California, except by service by publication of the summons in said action by order of said Court, and in accordance with the Statutes of the State of California in such case made and provided
24 and without any proceeding *in rem*.

XVIII.—That subsequently at various times during the year 1876, in open Court, during certain proceedings in bankruptcy pending in the United States District Court for the District of California, entitled, "In the Matter of Erwin Davis, a Bankrupt," wherein the defendant was a bankrupt, this defendant, as a means to procure his discharge in bankruptcy, solemnly asserted said judgment to be and adopted the same as valid, still standing of record in said Fifteenth District and in full force, and by reason of and based upon such assertion and adop

tion did procure an order and adjudication of said 25
Court in bankruptcy, dismissing the specifications of opposition to his discharge in bankruptcy filed by said Pierre B. Cornwall, and did therefore and thereafter procure such discharge.

XIX.—That no part thereof has been paid, and the whole amount thereof still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from December 18, 1872.

XX.—That said judgment recovered December 18, 1872, was duly given, made and entered by said District Court of the Fifteenth Judicial District of 26
the State of California, in and for the City and County of San Francisco.

And for a fourth, separate and distinct cause of action.

XXI.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

XXII.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

XXIII.—That on the eighteenth day of December, 1872, and for a year previous thereto, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State. 27

XXIV.—That on or about the 2d day of August, A. D. 1872, this plaintiff commenced an action in the said Court against the said Erwin Davis, and in the due course of the said action, on the 18th day of December, 1872, this plaintiff obtained a judgment

of said Court in his favor and against the said Erwin Davis, which said judgment still stands of record in said District, and is in full force.

XXV.—That by the terms of said judgment it was ordered, adjudged and decreed that this plaintiff have and recover from said defendant Erwin Davis, in United States gold coin, the sum of seventeen thousand and three $\frac{52}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from December 18, 1872, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty $\frac{12}{100}$ dollars, amounting in all to seventeen thousand and forty-three $\frac{64}{100}$ dallars.

XXVI.—That said judgment was so given and recovered without jurisdiction in said Court of the person of said defendant (who was not then a resident of California) except by service by publication of the summons in said action by order of said Court, and in accordance with the statutes of the State of California in such case made and provided, and without any proceeding *in rem*.

XXVII.—That subsequently at various times during the year 1876, in open court during certain proceedings in bankruptcy pending in the United States District Court for the District of California, entitled, "In the Matter of Erwin Davis, a bankrupt," wherein this defendant was the bankrupt, this defendant, as a means to procure his discharge in bankruptcy, solemnly asserted said judgment to be, and adopted the same as valid, still standing of record in said Fifteenth District, and in full force, and by reason of and upon such assertion and adoption, did procure an order and adjudication of said Court in bankruptcy, dismissing the specifications of opposition to his discharge in bankruptcy filed by said plaintiff, and did therefore and thereafter procure such discharge.

XXVIII.—That no part thereof has been paid, and the whole amount still remains due, owing and unpaid to this plaintiff with interest at the rate of seven per cent. per annum from December 18, 1872. 31

XXIX.—That in a certain suit in equity in this Court wherein this plaintiff was complainant and this defendant was defendant, brought upon the above alleged facts after due appearance and answer by defendant, and in the course of said suit a decree was duly given, made and entered March 9, 1891, whereby it was ordered, adjudged and decreed that said defendant, Erwin Davis, his heirs, assigns, executors and administrators be, and they, and each and every one of them, are forever estopped from 32 claiming, alleging or setting up against the complainant, Pierre B. Cornwall, his heirs, executors, administrators and assigns, or any or either of them, by answer, demurrer, plea or other defense or declaration, complaint, bill of complaint, reply, replication or in any other manner or form in any action at law or suit in equity, or in any proceeding whatever, in this or any other jurisdiction, and from in any manner whatsoever and wheresoever maintaining that said judgment (of December 18, 1872) was not duly given, made or entered by a Court having competent jurisdiction, is not valid and does not still stand of record in said District Court of said Fifteenth Judicial District, and is not in full force 33 against the said defendant, Erwin Davis, his heirs, executors, administrators and assigns, or any and every of them.

XXX.—And it is further ordered, adjudged and decreed in said equity suit that a perpetual injunction to this effect be issued against said Erwin Davis. And thereupon such other proceedings were had that said perpetual injunction was duly issued, of all which the said defendant, Erwin Davis, had due notice.

34 XXXI.—That said judgment recovered December 18, 1872, was duly given, made and entered by said District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

Wherefore, the plaintiff demands judgment against the defendant, Erwin Davis, in the sum of seventeen thousand and forty-three $\frac{64}{100}$ dollars (17,043.64) in United States gold coin with interest at the rate of 7 per cent. per annum, from December 18, 1872, besides the costs and disbursements of this action.

ANSON MALTBY,
35 Attorney for Plaintiff.

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
City and County of New York. } ss.:

ANSON MALTBY, being duly sworn, says: That he is the attorney for the plaintiff herein, and resides at New Rochelle, in the county of Westchester. That the foregoing complaint is true to the knowledge of the deponent, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be
36 true.

Deponent further says that the sources of his knowledge and the grounds of his belief as to all matters therein not stated upon his knowledge are as follows: the possession and inspection of exemplified copies of the judgment roll entered in the action alleged in the foregoing complaint, and of records docketed in the matter of Erwin Davis, a bankrupt in the United States District Court for the District of California, and the inspection of documents forming the judgment roll filed in a suit in Equity in the United States Circuit Court for the Southern District of New York, March, 1891, wherein

this plaintiff was complainant and this defendant was defendant. 37

Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not within the said County of Westchester, nor within the State of New York.

ANSON MALTBY.

Sworn to before me this 15th day of February, 1892.

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co.

[SEAL]

City and County of New York, ss.:

FREDERICK W. KANNOFSKY, being duly sworn, deposes and says, that he is 16 years of age and upwards, that on the 16th day of February 1892, between the hours of 12 M. and 1 P. M., at their offices in the Mills Building, in the City of New York, he served the foregoing amended complaint upon defendant's attorneys in this action by delivering to and leaving with the person in charge of said office, personally, a true copy thereof. 38

FREDERICK W. KANNOFSKY.

Sworn to before me this 16th day of February, 1892.

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co.

[SEAL.] 39

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Pierre B. Cornwall, Plaintiff against Erwin Davis, Defendant.—Amended Complaint.—Anson Maltby, Attorney for Plaintiff, 48 Wall St., N. Y. City.—U. S. Circuit Court, filed Feb'y 16, 1892.—John A. Shields, Clerk.

40 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL
Plaintiff.

AGAINST

ERWIN DAVIS,
Defendant.

41 The defendant Erwin Davis, by Kenneson, Crain & Alling, his attorneys, answering the amended complaint of the plaintiff herein by this his amended answer, alleges as follows:

I.—He denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs I., III. and IV. of the complaint.

II.—He denies as alleged in paragraph V. of the complaint that the whole amount of the judgment therein referred to still remains due and owing or that any amount is due and owing to the plaintiff from this defendant.

42 III.—For a further and separate defense to the first cause of action set forth in the amended complaint this defendant, on information and belief, alleges as follows:

(1.) That prior to the 11th day of September, 1869, this defendant had made and delivered to the plaintiff five promissory notes in writing, in the words and figures following, that is to say:

"$2,573.70. SAN FRANCISCO, August 26th, 1869.

"On the 25th day of September, 1869, at three "o'clock P. M. of that day (no grace), for value re-

"ceived in gold coin of the Government of the 43
"United States, I promise to pay to the order of P.
"B. Cornwall, at the Bank of California, in this
"City, twenty-five hundred and seventy-three $\frac{70}{100}$
"dollars with interest from date at the rate of one
"per cent. per month until paid, payable monthly,
"both principal and interest payable in the like gold
"coin.

"(Signed) ERWIN DAVIS."

"$2,800. SAN FRANCISCO, August 26th, 1869.

"On the 25th day of October, 1869, at three
"o'clock P. M. of that day (no grace), for value re-
"ceived in gold coin of the Government of the
"United States, I promise to pay to the order of P. 44
"B. Cornwall, at the Bank of California, in this
"City, twenty-eight hundred dollars, with interest
"from after due at the rate of one per cent. per
"month until paid, payable monthly, both principal
"and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$2,800. SAN FRANCISCO, August 26th, 1869.

"On the 24th day of November, 1869, at three
"o'clock P. M. of that day (no grace), for value re-
"ceived in gold coin of the Government of the
"United States, I promise to pay to the order of
"P. B. Cornwall, at the Bank of California, in this
"City, twenty-eight hundred dollars, with interest
"from after due, at the rate of one per cent. per 45
"month until paid, payable monthly, both principal
"and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$2,800. SAN FRANCISCO, August 26, 1869.

"On the 24th day of December, 1869, at three
"o'clock P. M. of that day (no grace) for value re-
"ceived in gold coin of the Government of the
"United States, I promise to pay to the order of P.
"B. Cornwall, at the Bank of California, in this city,
"twenty-eight hundred dollars, with interest from

46 " after due at the rate of one per cent. per month
" until paid, payable monthly, both principal and in-
" terest payable in the like gold coin.

" (Signed) ERWIN DAVIS."

"$2,810. SAN FRANCISCO, August 26, 1869.

" On the 23rd day of January, 1870, at three o'clock
" P. M. of that day (no grace) for value received in
" gold coin of the Government of the United States,
" I promise to pay to the order of P. B. Cornwall at
" the Bank of California, in this city, twenty-eight
" hundred and ten dollars, with interest from after
" due at the rate of one per cent. per month until
" paid, payable monthly, both principal and interest
47 " payable in the like gold coin.

" (Signed) ERWIN DAVIS."

(2.) That subsequently to the said making and delivery of said notes and on or about September 11, 1869, this defendant filed in the United States District Court for the District of California, his petition to be adjudged a voluntary bankrupt. That thereafter and on or about September 30, 1869, this defendant was, by a decree of said United States District Court, adjudged a bankrupt.

(3.) That subsequent to said decree of said United States District Court in bankruptcy, and subsequent
48 to September 30, 1869, said P. B. Cornwall duly proved said promissory notes as alleged debts due to him from this defendant against the estate of this defendant in said bankruptcy proceedings.

(4.) That subsequent to said proof of said notes in said bankruptcy proceedings, and on or about the 25th day of July, 1872, said Pierre B. Cornwall noticed a motion and filed in said bankruptcy proceedings in said United District Court for the District of California, a petition for leave to sue this defendant.

(5.) That thereafter and on or about July 30, 49
1872, an order was entered in said United States District Court in said bankruptcy proceedings, granting said P. B. Cornwall leave to bring an action upon said promissory notes against this defendant.

(6.) That thereafter, pursuant to said order of leave said P. B. Cornwall began in August, 1872, an action against this defendant upon said promissory notes in the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

(7.) That thereafter and on the 18th day of December, 1872, in said action said P. B. Cornwall 50
obtained a judgment against this defendant in said District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco, by the terms of which judgment it was ordered, adjudged and decreed that said Pierre B. Cornwall, the plaintiff in said action, have and recover from this defendant, the defendant therein, in United States gold coin, the sum of seventeen thousand and three $\frac{52}{100}$ dollars with interest thereon, at the rate of seven per cent. per annum from December 18, 1872, until paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty $\frac{12}{100}$ dollars, amounting in all to seventeen thousand and 51
forty-three $\frac{26}{100}$ dollars.

(8.) That thereafter, and subsequent to the entry of said judgment of December 18, 1872, and on or about December 23, 1875, this defendant filed in the United States District Court for the District of California, in said bankruptcy proceedings, a petition for the discharge of this defendant in bankruptcy, and thereafter and on or about the 6th day of March, 1877, at San Francisco, in the County of San Francisco, in the State of California, the said District Court of the United States for the District

52 of California, did by its decree, order and judgment, grant to this defendant a certificate of discharge. A copy whereof is hereto annexed marked Exhibit "A" and made a part of this answer.

(9.) That the plaintiff's claims and demands alleged in the complaint in said action by P. B. Cornwall against this defendant, in the said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, which resulted in said judgment of December 18, 1872, existed before September 11, 1869, the date when this defendant, as hereinbefore alleged, petitioned to be adjudged a voluntary bank-
53 rupt, and before September 30, 1869, the day on which this defendant was, as hereinbefore alleged, adjudged a bankrupt, and said claims and demands were provable and were proved by said P. B. Cornwall against the estate of this defendant in the proceedings in the United States District Court in which said discharge was granted.

(10.) That the debts, claims and demands alleged in the complaint in said action by P. B. Cornwall against this defendant in the said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, were not, nor was any part thereof created by
54 the fraud or embezzlement of this defendant or by this defendant's defalcation as a public officer, or while this defendant was acting in any other fiduciary character.

(11.) That the said judgment of December 18, 1872, obtained by P. B. Cornwall against this defendant in said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco is, in law, the same debt and claim or demand as the debts, claims or demands set forth in the complaint in said action which resulted in said judgment.

(12.) That the discharge granted to this defend- 55
ant as aforesaid on March 6, 1877, did forever bar and discharge the debts, claims and demands alleged in the complaint in the said action by P. B. Cornwall against this defendant in the said District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco, and interest thereon, and also did forever bar and discharge the said judgment obtained by P. B. Cornwall against this defendant in said action on December 18, 1872, and interest thereon.

IV.—He denies any knowledge or information sufficient to form a belief as to any or all the allegations contained in paragraphs VI., VIII., and IX., 56
of the complaint.

V.—While this defendant does not deny that the judgment referred to in paragraph X. of the complaint, if ever given, made or entered, was "duly" given, made or entered, yet he denies any knowledge or information sufficient to form a belief as to whether the judgment therein referred to was ever given, made or entered by the District Court therein referred to.

VI.—He denies, as alleged in paragraph XI. of the complaint, that the whole amount of the judgment therein referred to still remains due and owing, and he denies that any amount is due and 57
owing from this defendant to the plaintiff.

VII.—For a further and separate defense to the second cause of action set forth in the amended complaint, this defendant re-alleges with the same force and effect as if herein set forth in detail, each and all of the allegations hereinbefore set forth as a further and separate defense to the first cause of action stated in the amended complaint.

VIII.—He denies any knowledge or information sufficient to form a belief as to any or all of the alle-

58 gations contained in paragraphs XII., XIV., XVI., XVII., and XVIII. of the complaint herein.

IX.—This defendant denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraph XV. of the complaint, except the allegation contained in the words, "which judgment still stands of record in said District Court, and is in full force."

X.—While this defendant does not deny that the judgment referred to in paragraph twenty of the complaint, if ever given, made or entered, was "duly" given, made or entered, yet he denies any
59 knowledge or information sufficient to form a belief as to whether the judgment therein referred to was ever given, made or entered by the District Court therein referred to, or by any court.

XI.—He denies, as alleged in paragraph XIX. of the complaint, that the whole of the judgment therein referred to still remains due and owing, and he denies that any amount is due and owing from this defendant to the plaintiff.

XII.—For a further and separate defense to the third cause of action set forth in the amended complaint this defendant re-alleges with the same force
60 and effect as if herein set forth in detail each and all of the allegations hereinbefore set forth as a further and separate defense to the first cause of action stated in the amended complaint.

XIII.—He denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs XXI., XXIII., XXV., XXVI. and XXVII. of the complaint.

XIV.—This defendant denies any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraph XXIV.

of the complaint, except the allegation contained in the words, "which said judgment still stands of record in said District Court, and is in full force." 61

XV.—While this defendant does not deny that the judgment referred to in paragraph XXXI. of the complaint, if ever given, made or entered, was "duly" given, made or entered, yet he denies any knowledge or information sufficient to form a belief as to whether the judgment therein referred to was ever given, made or entered by the District Court therein referred to or by any other Court.

XVI.—He denies, as alleged in paragraph XXVIII. of the complaint, that the whole amount of the judgment therein referred to still remains due and owing, and he denies that anything remains due and owing from this defendant to the plaintiff. 62

XVII.—For a further and separate defense to the fourth cause of action set forth in the amended complaint, this defendant re-alleges with the same force and effect as if herein set forth in detail, each and all of the allegations hereinbefore set forth as a further and separate defense to the first cause of action stated in the amended complaint.

Wherefore, this defendant demands judgment against the plaintiff, dismissing the amended complaint herein with costs and disbursements in this action. 63

KENNESON, CRAIN & ALLING,
Attorneys for Defendant,
Office and Post Office address,
35 Wall Street,
N. Y. City.

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
City and County of New York, } ss.:

ERWIN DAVIS, being duly sworn, says: That he is the defendant in this action; that he has read the

64 foregoing amended answer to the amended complaint herein, and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ERWIN DAVIS.

Sworn to before me this 3d day of August, 1892.

PETER S. JONES,
Commr. of Deeds,
City and Co. of N. Y.

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65 **Exhibit "A."**

CERTIFICATE OF FINAL DISCHARGE IN BANKRUPTCY.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CALIFORNIA.

In Bankruptcy.

IN THE MATTER
66 OF
ERWIN DAVIS, Voluntary Bankrupt.

District of California, ss.:

Whereas, Erwin Davis, of San Francisco, in the County of San Francisco, and State of California, has been by this Court duly adjudged a bankrupt under the Act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and appears

to have conformed to all the requirements of the law 67
in that behalf.

It is therefore ordered by the Court that said Erwin Davis be, and he hereby is, forever discharged of and from all debts and claims, which by said act are made provable against his estate, and which existed on the 11th day of September, A. D. 1869, on which day the petition for adjudication was filed by Erwin Davis, excepting such debts, if any, as are by said Act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the said District Court at San Francisco, in said district, this the sixth day of March, A. D. one thousand eight hundred and seventy-seven. 68

OGDEN HOFFMAN,
[SEAL.] Judge of the District Court, U. S.,
For the District of California.

I, SOUTHARD HOFFMAN, Clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the certificate of final discharge in bankruptcy of Erwin Davis, on file and of record in my office.

Attest my hand and seal of said District Court, this 7th day of March, A. D. 1877.

SOUTHARD HOFFMAN,
[SEAL.] Clerk. 69

(Endorsed)--U. S. Circuit Court, Southern Dist. of N. Y.—Pierre B. Cornwall, Plff., agst. Erwin Davis, Deft.--(orig.) Second Amended Answer.—Kenneson, Crain & Alling, Attorneys for defendant, Office and Post Office Address, 35 Wall Street, New York City.—U. S. Circuit Court, filed Aug. 4, 1892, John A. Shields, Clerk.

70 At a Stated Term of the Circuit Court of the United States, Second Circuit, held in and for the Southern District of New York, at the United States Circuit Court Room, in the City of New York, on the 20th day of October, 1892.

Present—Hon. NATHANIEL SHIPMAN, *Judge*.

PIERRE CORNWALL,
Plaintiff,
vs.
71
ERWIN DAVIS,
Defendant.

Now comes the plaintiff, by Anson Maltby, his attorney, and moves the trial of this case.

Likewise comes the defendant, by Messrs. Kenneson, Crain & Alling, his attorneys.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the parties and the argument of counsel on the twentieth day of October, 1892, the Court directs the jury to find a ver-
72 dict for the plaintiff Pierre B. Cornwall against the defendant Erwin Davis, in the sum of thirty-eight thousand five hundred and thirty-three $\frac{29}{100}$ dollars ($38,533.29).

The jury render a verdict whereby they find for the plaintiff and against the defendant in the said sum.

It is ordered that forty-five days' stay be allowed in which defendant may file and serve his bill of exceptions.

(An Extract from the Minutes.)

JOHN A. SHIELDS,
Clerk.

CIRCUIT COURT OF THE UNITED STATES 73

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL,
Plaintiff,

vs.

ERWIN DAVIS,
Defendant.

74

We hereby consent that Messrs. Logan, Clark & Demond be substituted in our place and stead as attorneys for the defendant herein, Erwin Davis.

Dated New York, November 28, 1892.

KENNESON, CRAIN & ALLING,
Attys. for Defendant.

(Endorsed)—U. S. Circuit Court, So. District of New York.—Pierre B. Cornwall, Plaintiff, *vs.* Erwin Davis, Defendant.—Consent for substitution of attorneys of defendant.—Logan, Clark & Demond, Substituted Attys. for deft.—58 William Street, New York.—U. S. Circuit Court.—Filed Nov. 29, 1892.—John A. Shields, Clerk.

75

76 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL AGAINST ERWIN DAVIS.	Law Action No. 2198.

On reading and filing the consent of the attorneys
77 for the defendant herein, and on motion of Logan, Clark & Demond, it is

Ordered, that Logan, Clark & Demond be and they hereby are substituted for and in the place of Kenneson, Crain & Alling as attorneys for the defendant herein.

November 29, 1892.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

78

PIERRE B. CORNWALL, Plaintiff, AGST. ERWIN DAVIS, Defendant.	

This action having come on to be tried in its regular order on the calender before the Honorable Nathaniel Shipman, Judge, and a jury, at a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in

the Second Circuit, at the United States Circuit 79
Court Room, in the City of New York, on the 20th day of October, 1892; and the counsel for the plaintiff having moved that a verdict be directed in favor of the plaintiff upon the pleadings herein and upon the evidence produced upon the trial; and the jury having found a verdict for the plaintiff and against the defendant, under direction of the Court, in the sum of thirty-eight thousand five hundred and thirty-three dollars and twenty-nine cents ($38,533.29), and the costs of the plaintiff having been duly taxed on notice at the sum of fifty-seven dollars and twenty-three cents ($57.23);

Now, on motion of Anson Maltby, Esquire, attorney for the plaintiff, it is adjudged that said 80
plaintiff Pierre E. Cornwall have judgment upon the merits against the defendant Erwin Davis in the sum of thirty-nine thousand and twenty-one and $\frac{37}{100}$ ($39,021.37) dollars, being the amount of said verdict and interest thereon to this day, and that said plaintiff recover of Erwin Davis, the defendant, the sum above named, together with the sum of fifty-seven and $\frac{23}{100}$ ($57.23) dollars costs, as adjusted, amounting together to the sum of thirty-nine thousand and seventy-eight and $\frac{60}{100}$ ($39.078.60) dollars, and that he have execution therefor.

Judgment signed this 5th day of January, 1893.

JOHN A. SHIELDS,
Clerk. 81

(Endorsed)—U. S. Circuit Court.—So. Dist. of New York.—Pierre B. Cornwall, Plaintiff, against Erwin Davis, Defendant. —Judgment Roll.—Anson Maltby, Attorney for Plaintiff, 48 Wall Street, New York City.—U. S. Circuit Court.—Filed Jan. 5, 1893.—John A. Shields, Clerk.

82 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL

AGAINST

ERWIN DAVIS.

83 BILL OF EXCEPTIONS.

Be it remembered that afterward, to wit, on the 20th day of October, in the year of our Lord one thousand eight hundred and ninety two, at a Stated Term of said Court, begun and held in New York City, in and for the Southern District of New York, before his Honor Nathaniel Shipman, Circuit Judge, duly assigned to hold said Court, the issue joined in the above stated cause between the said parties, under the pleadings herein, came on to be heard before the said Judge and a jury, the plaintiff being represented by Anson Maltby, Esq., his attorney, and the defendant being represented by Thaddeus D. Kenneson, Esq., his attorney. And upon the
84 trial of that issue the attorney for the said plaintiff, to maintain and prove the said issue on his part, offered the following evidence, and the following proceedings were had:

At the beginning of said trial, Mr. Kenneson, the defendant's attorney, moved the Court that the plaintiff be compelled to elect on which of the four counts in the complaint he would go to trial. Whereupon the plaintiff's attorney objected, and the said Judge did then and there sustain said objection. Whereupon the attorney for the defendant did then and there except.

Whereupon the plaintiff's attorney opened the case to the jury. 85

Thereupon the plaintiff's attorney stated as follows:

"I offer in evidence an exemplified copy of a judgment of the Fifteenth Judicial District Court of California, obtained in an action in which Pierre B. Cornwall was plaintiff, and Erwin Davis was defendant, and entered December 18, 1872."

Whereupon the defendant's attorney made the following objections, in the following language: "I object on the ground that the only proper evidence would be the judgment roll, and the further objection that the judgment on its face shows that it was a judgment of the Fifteenth Judicial District of the State of California, and the certification is by a certificate of the Clerk of the Superior Court of San Francisco, and is not such an exemplification as is required by the Statute." Thereupon the said Judge inquired of the plaintiff's attorney whether he had the entire judgment roll, and receiving an affirmative answer, the said Judge stated: "I think you had better offer it." Whereupon the plaintiff's attorney made the following offer: "Then I offer the entire judgment roll." 86

Upon said offer the defendant's attorney made the following objection: "The papers here offered contain more than the roll. They are a transcript of a record on appeal. I object to anything more than the record in the lower court, and I make the same objection as before, that the record of itself shows on its face that it is not certified by a clerk of the court in which the judgment was entered, and therefore is not properly certified." 87

Thereupon said Judge admitted said roll in evidence. Whereupon the defendant's attorney, then and there took an exception. The judgment roll so admitted reads as follows:

88 IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA.

PIERRE B. CORNWALL,
Plaintiff and Appellant,

AGAINST

ERWIN DAVIS,
Defendant and Respondent.

89 TRANSCRIPT OF APPEAL FROM THE FIFTEENTH DISTRICT COURT.

W. H. L. BARNES, Attorney for Appellant.
C. DORSEY, Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

COMPLAINT.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

90

PIERRE B. CORNWALL,
Plaintiff,

AGAINST

ERWIN DAVIS,
Defendant.

The complaint of Pierre B. Cornwall, plaintiff in this action, against Erwin Davis, defendant herein,

respectfully shows to the Court and alleges as follows: 91

FIRST.—That on or about the twenty-sixth day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following, that is to say:

"$2,573 $\frac{70}{100}$. SAN FRANCISCO, August 26, 1869.

"On the 25th day of September, 1869, at 3 o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California in this city, Twenty-five hundred and seventy-three $\frac{70}{100}$ dollars, with interest 92
from date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid, except the sum of fourteen hundred and seven $\frac{43}{100}$ dollars, paid by said defendant on account of said note on or about the 6th day of June, 1870. 93

And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the Court as follows:

That on or about the 26th day of August, in the year 1869, at the City and County of San Franciso, State of California, the said defendant Erwin Davis made his certain promissory note in writing in the words and figures following, that is to say:

"$2,800. SAN FRANCISCO, August 26th, 1869.

"On the 25th day of October, 1869, at three o'clock P. M. of that day (no grace), for value received in

94 gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California, in this city, Twenty-eight hundred dollars, with interest from after due, at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became, and ever since has been and now is, the owner and holder thereof.

And for a further and separate cause of action
95 against said defendant, the plaintiff alleges and shows to the Court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant Erwin Davis made his certain promissory note in writing, in the words and figures following, that is to say:

"$2,800. SAN FRANCISCO, August 26th, 1869.

"On the twenty-fourth day of November, 1869, at 3 o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Corn-
96 wall, at the Bank of California, in this city, Twenty-eight hundred dollars, with interest from after due, at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became, and ever since has been and now is, the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the Court as follows: 97

That on or about the 26th day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Ervin Davis, made his certain promissory note in writing in the words and figures following, that is to say:

"$2,800. SAN FRANCISCO, August 26th, 1869.

"On the 24th day of December, 1869, at 3 o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California, in this city, Twenty-eight hundred dollars, with interest from after due at the rate of one per cent. per month until paid, payable monthly; both principal and interest payable in the like gold coin. 98

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became, and ever since has been, and now is, the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against said defendant, the plaintiff alleges and shows to the Court as follows: 99

That on or about the 26th day of August, in the year 1869, at the City and County of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing, in the words and figures following, that is to say:

$2,810. SAN FRANCISCO, Aug. 26, 1869.

"On the 23d day of January, 1870, at 3 o'clock P. M. of that day (no grace), for value received in gold coin of the Government of the United States, I

100 promise to pay to the order of P. B. Cornwall, at the Bank of California, in this city, twenty-eight hundred and ten dollars, with interest from after due at the rate of one per cent per month until paid, payable monthly, both principal and interest payable in the like gold coin.

(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became, and ever since has been, and now is, the owner and holder thereof.

That no part thereof, or of the interest due thereon, has been paid.

101 And for a further and separate cause of action against said defendant, the plaintiff alleges and shows to the Court as follows:

That before and at the time of the commencement of this action the defendant was indebted to the plaintiff in the sum of eight dollars and fifty cents, gold coin of the United States, for money laid out and expended by the plaintiff to and for the use and benefit of the defendant, in paying the costs, expenses and charges of the protest of the promissory notes mentioned in the first and second causes of action herein contained. That the defendant, though often requested, hath not paid the same, or any part thereof.

102

Wherefore, the plaintiff demands judgment against the said defendant for the sum of twelve thousand three hundred and eighty-four dollars and seventy seven cents, and with interest on two thousand five hundred and seventy-three dollars, seventy cents, parcel thereof, from August 26, 1869, to June 6, 1870, at the rate of one per cent. per month and with interest on one thousand one hundred and sixty-six $\frac{27}{100}$, parcel thereof from June 6, 1870, at the same rate, and with interest on two thousand eight hundred dollars, parcel thereof from October 26, 1869, at the same

rate, and with interest on twenty-eight hundred dollars, parcel thereof, from November 24, 1869, at the same rate, and with interest on twenty-eight hundred dollars, parcel thereof, from December 24, 1869, at the same rate, and with interest on twenty-eight hundred and ten dollars, parcel thereof, from January 23, 1870, at the same rate. That the same be decreed and ordered to be paid only in gold coin of the United States, and that plaintiff may recover his costs and disbursements in this action. 103

WM. H. L. BARNES,
Plaintiff's Attorney.

City and County of San Francisco, ss.:

PIERRE B. CORNWALL, being duly sworn, deposes and says he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief; and as to those matters, he believes it to be true. 104

P. B. CORNWALL.

Subscribed and sworn to before me this 29th day of September, A.D. 1872.

[SEAL] F. J. THIBAULT,
Notary Public.

(Endorsed)—Filed August 2, 1872. 105

(Title of Court and Cause.)

SUMMONS.

The People of the State of California send greeting to Erwin Davis, defendant.

You are hereby required to appear in an action brought against you by the above named plaintiff, in the District Court of the Fifteenth Judicial District of the State of California, in and for the City

and County of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days. Otherwise, within forty days,—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover, in gold coin of the United States, the sum of $12,384.77, with interest thereon at the rate of one per cent. per month alleged to be due to plaintiff from defendant, upon and by reason of said defendant's five promissory notes delivered to said plaintiff, as particularly set forth in the complaint on file herein, besides costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you in gold coin for said sum of $12,384.77, with interest and costs.

Given under my hand and seal of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, this second day of August, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] WILLIAM HARNEY,
Clerk.
By JNO. P. POOLE,
Deputy Clerk.

(Endorsed)—Filed August 9, 1872.

(Title of Court and Cause.) 109

AFFIDAVIT FOR PUBLICATION OF SUMMONS.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

PIERE B. CORNWALL, being duly sworn, says that he is the plaintiff in the above entitled action. That the complaint in said action was filed with the Clerk of said Court on the second day of August, 1872, and summons thereupon issued. That said action is brought to recover the sum of $12,384.77, due and unpaid by said defendant, Erwin Davis, to the plaintiff, upon five promissory notes made by said defendant and dated at the City of San Francisco 110
on the 26th day of August, A. D. 1869, and payable to the plaintiff or his order, with interest at the rate of one per cent. per month until paid, as follows, that is to say:

One due September 25, 1869, with interest from August 26, 1869, for	$25,073 70
One due October 25, 1869, with interest from that date, for	2,800 00
One due November 24, 1869, with interest from that date, for	2,800 00
One due December 24, 1869, with interest from that date, for	2,800 00
One due January 23, 1870, with interest from that dute, for	2,810 00 111
And notarial charges on the two first notes	8 50
	$13,792 20
Less cash received by plaintiff, June 6, 1870, on account of the first note	1,407 43
Together	$12,384 77

That, as deponent has been informed and believes, and therefore alleges, said defendant, Erwin Davis,

112 resides out of the State of California, to wit, in the City and County and State of New York.

Wherefore deponent prays this Honorable Court for an order that the service of the summons in this action may be made by publication thereof.

F. B. CORNWALL.

Subscribed and sworn to this 8th day of August, A. D., 1872, before me.

[SEAL.] P. J. THIBAULT, Notary Public.

(Endorsed)—Filed August 9, 1872.

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113 (Title of Court and Cause.)

ORDER FOR PUBLICATION OF SUMMONS.

Upon reading and filing the affidavit of the plaintiff, P. B. Cornwall, and it satisfactorily appearing therefrom to me, the Judge of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, that the defendant is now residing out of the State of California, to wit, in the City, County and State of New York, and it appearing from the affidavit aforesaid that a good cause of action exists in this action in favor of the plaintiff therein and against the said defendant, and that the said defendant is a necessary and proper party defendant thereto, and it further appearing that the summons has been duly issued out of said Court in this action and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained and by the said affidavit made to appear, on motion of W. H. L. Barnes, Esq., attorney for the plaintiff, it is

114

Ordered, that the service of the summons in this action be made upon the defendant Erwin Davis, by publication thereof in the daily *Evening Bulletin*, a newspaper published at San Francisco, aforesaid,

hereby designated as the newspaper most likely to 115
give notice to said defendant. That said publication be made at least once a week for two months.

And it further, in like manner, satisfactorily appearing to me that the residence of said defendant is in the City, County and State of New York, it is ordered that a copy of the summons and a certified copy of the complaint in this suit be forthwith deposited in the post office, postpaid, directed to said defendant at said place of residence.

Dated August 9, A. D., 1872.

SAMUEL H. DWINELLE,
Judge of the District Court of the
Fifteenth Judicial District of the
State of California in and for the 116
City and County of San Francisco.

(Endorsed)—Filed August 9, 1872.

(Title of Court and Cause.)

PROOF OF DEPOSIT.

City and County of San Francisco, } ss.:
STATE OF CALIFORNIA, }

JAMES H. DANE, being duly sworn, deposes and says he is managing clerk to William H. L. Barnes, and competent to be a witness on the trial of the action in the above-entitled suit. That on the 9th day of August, one thousand eight hundred and seventy-two, he deposited in the post office of the City 117
and County of San Francisco, in a sealed envelope, a copy of the summons and complaint in this case, directed to the defendant, Erwin Davis, City, County and State of New York, and prepaid the legal postage thereon.

JAS. HY. DANE.

Subscribed and sworn to before me this 29th day of August, A. D. 1872.

H. W. KIND,
Dep. Co. Clerk.

(Endorsed)—Filed November 29th, 1872.

AFFIDAVIT OF PUBLICATION.

118

SAN FRANCISCO, October 14, 1872.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.:

A. C. BONNELL, of the said City and County, being duly sworn, affirms and says that he is a white, male citizen of the United States. That he is over twenty-one years of age and is competent to be a witness on the hearing of the matters mentioned in the annexed summons. That he has no interest whatever in the case mentioned therein, and that he is the principal clerk of the printers and pub-
119 lishers of the *Daily Evening Bulletin*, a newspaper which is published daily (Sundays and holidays excepted) in said city and county, and has charge of all the advertisements in said newspaper, and that the summons in the case of Pierre B. Cornwall, plaintiff, *vs.* Erwin Davis, defendant, of which the following is a printed copy:

"In the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco."

Pierre B. Cornwall, plaintiff, *vs.* Erwin Davis, defendant.—Action brought in the District Court of the Fifteenth Judicial District of the State of Cali-
120 fornia in and for the City and County of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the Clerk of said District Court.

The People of the State of California send greeting to Erwin Davis, defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Ffteenth Judicial District of the State of California, in and for the City and County of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the

day of service) after the service on you of this sum- 121
mons, if served within this county, or if served out of this county, but in this district, within twenty days. Otherwise, within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover in gold coin of the United States the sum of $12,386.77, with interest thereon at the rate of one per cent. per month, alleged to be due to plaintiff from defendant, upon and by reason of defendant's said five promissory notes delivered to plaintiff, as particularly set forth in the complaint on file herein, besides costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint, as above re- 122
quired, the said plaintiff will take judgment against you, in gold coin, for said sum of $12,384.77, with interest and costs.

Given under my hand and seal of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, this second day of August, in the year of our Lord one thousand eight hundred and seventy-two.

WILLIAM HARNEY,
[SEAL.] Clerk.
By JOHN P. POOLE,
Deputy Clerk.

W. H. L. BARNES,
Attorney for Plaintiff," 123

has been published once a week for two successive months in the above named newspaper, commencing (first insertion) Saturday, August 10, 1872, and ending (last insertion) Saturday, October, 12, 1872 (10 insertions), and further sayeth not.

A. C. BONNELL.

Subscribed and sworn to this 14th day of October, 1872, before me.

SAMUEL S. MURFEY,
[SEAL.]. Notary Public.

(Endorsed.)—Filed October 16, 1872.

124 CERTIFICATE OF SECRETARY OF STATE.

STATE OF CALIFORNIA—DEPARTMENT OF STATE.

SACRAMENTO, August 20, 1872.

I, DRURY MALONE, Secretary of the State of California, do hereby certify that on the 20th day of August, 1872, there was received and filed in this office and duly entered and indexed in the "Register of Absent Defendants," a duly certified copy of the order of publication of summons, also a copy of the summons and a copy of the newspaper containing the publication thereof, in the case of P. B. Cornwall vs. Erwin Davis, in the District Court of the
125 Fifteenth Judicial District, held in and for the County of San Francisco, State of California, and that the following is the name of the defendant as to whom the publication of summons was directed to be made—Erwin Davis.

Witness my hand and the great seal of State, at office in Sacramento, California, the 20th day of August, 1872.

[SEAL.]

DRURY MALONE,
Secretary of State.
H. H. RUSSELL,
Deputy.

126 (Endorsed)—Filed October 16, 1872.

(Title of Court and Cause.)

JUDGMENT.

On motion of W. H. L. Barnes, Esq., of counsel for plaintiff, and upon due proof of the service upon the defendant of the process issued herein, and it appearing to the Court that the time for answering has expired, and that the defendant has failed to appear, answer or demur,

It is ordered by the Court, that the default of the 127
defendant be and the same is hereby entered.

Whereupon a witness was sworn and examined on behalf of said plaintiff, and the Court orders that judgment be drawn and entered herein in favor of plaintiff and against the defendant for the sum of $17,003.52, in United States gold coin.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that Pierre B. Cornwall, plaintiff, have and recover from Erwin Davis, defendant, in United States gold coin, the sum of seventeen thousand and three $\frac{52}{100}$ dollars ($17,003.52), with interest thereon at the rate of seven per cent. per annum from the date hereof till paid, together with said plaintiff's 128
costs and disbursements incurred herein, amounting to the sum of forty and $\frac{12}{100}$ ($40.12) dollars.

Judgment recorded December 18, A. D. 1872. "C" 516.

Judgment roll comprising and consisting of the whole of the foregoing filed December 18, 1872.

(Title of Court and Cause.)

NOTICE OF MOTION TO VACATE JUDGMENT. 129

To P. B. CORNWALL and his attorney:

Take notice that the defendant in this action, on Friday, the 13th day of April, A. D. 1877, at the opening of the Court on that day, will make a motion in open court to vacate and set aside the judgment of the Court heretofore rendered in this action on the 9th day of December, A. D. 1872, for the sum of seventeen thousand and three and $\frac{52}{100}$ dollars. with forty dollars costs of suit, entered and recorded in Judgment Book C, page 516, and to permit the defendant in this action to plead his discharge in

130 bankruptcy in bar of the original debt on which this action was founded.

Defendant will also make a motion for a perpetual injunction and stay of execution in this action.

These motions will be made in the court room of said court at the time hereinbefore stated or as soon thereafter as counsel can be heard, on the following grounds:

FIRST.—That the judgment is null and void for the reason that the service of summons was by publication and that the affidavit of plaintiff was insufficient to warrant the issuance of the order of publication of the summons or to sustain the judgment.

131 SECOND.—That the judgment is void for the further reason that prior to the commencement of the action the defendant was bankrupt, and on or about the 11th day of September he filed his petition in the District Court of the United States for the District of California, in the City of San Francisco and State of California, for the benefit of the Bankrupt Laws of the United States, and was, on or about the day of , A. D. 1869, duly adjudged a bankrupt.

That after the adjudication of bankruptcy of defendant, plaintiff in this action made proof of his debt against the defendant, and filed said proof of debt in said District Court of the United States, or
132 with the Register thereof. That by the proof of the debt in the bankruptcy proceedings, the plaintiff waived all right of action against defendant. That after filing said proof of debt, plaintiff commenced this action and obtained this judgment while said proceedings were still pending, and that this Court had no jurisdiction of the subject matter of the action nor of the person of the defendant, during the pendency of the proceedings in bankruptcy.

THIRD.—That the defendant, on or about the 6th day of March, A. D. 1877, was duly discharged from all his debts which were proven or provable in bank-

ruptcy, and that his discharge is a bar to both the 133
original debt and the judgment in this action.

FOURTH.—That the plaintiff has commenced suit against the defendant in France on the judgment in this action, and is endeavoring to enforce it against property acquired since his adjudication in bankruptcy.

These motions will also be made on the affidavit of Caleb Dorsey, a copy of which will be served with this notice of motion.

CALEB DORSEY,
Atty for Erwin Davis.

(Endorsed—Filed April 12, 1877). 134

AFFIDAVIT OF CALEB DORSEY, ATTORNEY FOR DEFENDANT.

(Accompanying the preceding Notice.)

(Title of Court and Cause.)

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.:

CALEB DORSEY, being duly sworn, deposes and says: That he is the attorney of Erwin Davis, the defendant in this action; and that he, the said 135
Erwin Davis, is absent from the State of California, and is at present in the State of New York.

Affiant further says that the complaint in this action was filed on or about the 3d day of August, A. D. 1872.

That there was no personal service of summons on the defendant.

That the service of summons was made by publication of the summons, and that a copy of plaintiff's affidavit for the order of publication is hereto attached and made a part of this affidavit; and that judgment was rendered by default on or about the

136 9th day of December, A. D. 1872, for the sum of seventeen thousand and three $\frac{52}{100}$ dollars, with forty dollars costs of suit, entered and recorded in judgment book C, page 516.

Affiant further states that on or about the 11th day of September, A. D. 1869, and prior to the commencement of this suit, the said Erwin Davis became bankrupt, and filed his petition for the benefit of the bankruptcy laws of the United States, in the District Court of the United States for the District of California, in the City of San Francisco, in the State of California, and was duly adjudicated a bankrupt on or about the 30th day of September, 1869.

137 That after said adjudication of bankruptcy, and long prior to the commencement of this suit, plaintiff made proof of his debt against said defendant, and filed it either in the District Court of the United States or with the Register thereof.

Affiant further states that prior to the commencement of this suit the District Court of the United States gave permission to plaintiff to bring this action pending the proceedings in bankruptcy and before said proceedings had been dismissed, either without a discharge or a discharge had been refused, and that said proceedings in bankruptcy have since ended by the said Court granting to the defendant a full and complete discharge of all his debts, proven
138 and provable in bankruptcy. The said discharge was granted on or about the 6th day of March, 1877.

Affiant further states that said plaintiff, as he has been informed and believes, has commenced suit in France on said judgment against said Erwin Davis and is now endeavoring to enforce it against property acquired since the adjudication of bankruptcy.

That affiant has obtained this information from said Erwin Davis and also from W. H. L. Barnes, the attorney of plaintiff. That he has heard both of them state that such suit has been commenced and that this affiant believes that said suit is not yet determined and is still pending.

Affiant further states that at the time the said 139
Erwin Davis filed his petition in the United States District Court, he was a resident of the City of San Francisco, and had also been a resident for at least ten years prior thereto.

CALEB DORSEY.
Atty. for Erwin Davis.

Subscribed and sworn to before me this 9th day of April, 1877.

[SEAL.] SAMUEL S. MURFEY,
Notary Public.

AFFIDAVIT FOR PUBLICATION OF SUMMONS. 140

(Accompanying the preceding notice.)

(Title of Court and Cause.)

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.:

PIERRE B. CORNWALL, being duly sworn, says: That he is the plaintiff in the above entitled action. That the complaint in said action was filed with the Clerk of said Court on the second day of August, 1872, and summons thereupon issued. That said action is brought to recover the sum of $12,384.77 due and unpaid by said defendant, Erwin Davis, to the plaintiff, upon five promissory notes made by 141
said defendant and dated at the City of San Francisco on the 26th day of August, A. D. 1869, and payable to the plaintiff or his order, with interest at the rate of one per cent. per month until paid, as follows, that is to say:

One due September 25, 1869, with interest from August 26th, 1869, for..	$25,073 70
One due October 25, 1869, with interest from that date, for.....	2,800 00
One due November 24, 1869, with interest from that date, for.....	2,800 00

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One due December 24, 1869, with interest from that date, for	$2,800 00
One due January 23, 1870, with interest from that date, for	2,810 00
And notarial charges on the two first notes	8 50
	$13,792 20
Less cash received by plaintiff, June 6, 1870, on account of the first note	1,407 43
	$12,384 77

That, as deponent has been informed and believes, and therefore alleges, said defendant, Erwin Davis,
143 resides out of the State of California, to wit, in the City and County and State of New York.

Wherefore deponent prays this Honorable Court for an order that the service of the summons in this action may be made by publication thereof.

P. B. CORNWALL.

Subscribed and sworn to this 8th day of August, A. D., 1872, before me.

F. J. THIBAULT,
[SEAL.] Notary Public.

(Endorsed)—Filed August 9, 1872.

(Title of Court and Cause.)

144

OPINION OF THE COURT.

The defendant's motion to set aside and vacate the judgment herein, to permit him to plead his final discharge in bankruptcy therein and for a perpetual injunction and stay of execution is granted to the extent of setting aside and vacating the judgment and permitting him to plead his discharge in bankruptcy on the authority of Wakelee *vs.* Davis (No. 8379), this day decided by this Court.

DWINELLE,
Judge.

(Endorsed)—Filed July 10, 1877.

(Title of Court and Cause.) 145

ORDER TO VACATE JUDGMENT.

The defendant's motion to vacate and set aside the judgment heretofore rendered and entered herein having heretofore been heard, submitted and taken under advisement, and now due consideration having been had;

It is ordered that said motion be and the same is hereby granted and allowed to the extent of vacating and setting aside said judgment and allowing defendant to plead his final discharge in bankruptcy, to which ruling and decision of the Court plaintiff, by his attorney, at the time excepted.

Decided July 10, 1877.

DWINELLE, 146
Judge.

(Title of Court and Cause.)

NOTICE OF APPEAL.

You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of this State from the order vacating the judgment therein made and entered in the said District Court on the 10th day of July, 1877, in favor of the defendant in said action and against said plaintiff, and from the whole thereof.

Dated this 30th day of August, 1877.

Yours, &c., 147
W. H. L. BARNES,
Atty. for Plaintiff and Appellant.

TO THE CLERK OF THE SAID DISTRICT COURT and
CALEB DORSEY, Esq.,
Atty. for Defendant and Respondent.

Received a copy of the within this 30th day of August, 1877.

CALEB DORSEY,
Atty. for Deft.

Service accepted by copy this day of 187

Attorney for Respondent.

148 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

DEPARTMENT TWO.

PIERRE B. CORNWALL, Appellant, vs. ERWIN DAVIS, Respondent.	February 5, 1881.

DEPARTMENT TWO.

(Filed February 5, 1881.)

149 By the Court.

CORNWALL vs. DAVIS. — No. 5822.

On the authority of Wakelee *vs.* Davis, No. 5817, and the cases there cited, the order is reversed.

I, FRANK W. GROSS, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion delivered in the above entitled cause on the 5th day of February, A. D. 1881, and now on file in my office.

Witness my hand and the seal of the Court this 17th day of February, A. D. 1881.

150 (Seal of Supreme Court of California.) FRANK W. GROSS, Clerk, By C. HARLAN, Deputy.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA. 150a

No. 5822.

DEPARTMENT TWO.

PIERRE B. CORNWALL, Appellant, vs. ERWIN DAVIS, Respondent.	On Appeal from the District Court of the 15th Judicial District, in and for the City and County of San Francisco.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the Court and all and singular the 150b law and premises being by the Court here seen, understood and fully considered, the opinion of the Court herein is delivered by the Court.

Whereupon it is now considered, ordered, adjudged and decreed by the Court here that the order of the District Court of the 15th Judicial District in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby reversed, with costs, and cause remanded to the Superior Court in and for the City and County of San Francisco.

I, FRANK W. GROSS, Clerk of the Supreme Court of the State of California, do hereby certify that the 150c foregoing is a true copy of an original judgment entered in the above entitled cause on the 5th day of February, A. D. 1881, and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office this 7th day of March, A. D. 1881.

F. W. GROSS, Clerk,

[SEAL.] By J. B. MARTIN, Deputy.

(Endorsed)—15th Dist. Court, 7769, late 15th No. 5822.—In the Supreme Court, State of California.—Remittitur.—Cornwall *vs.* Davis.—Clerk's costs, $20; paid by appellant, $15; paid by respondent, $5, total $20.—F. W. Gross, Clerk, by J. B. Martin, Deputy.

150d The foregoing Exhibit Transcript, as well as all other exhibits introduced in evidence herein, showing proceedings in the District Court of the 15th Judicial District of the State of California in and for the City and County of San Francisco, or showing proceedings in the District Court of the United States for the District of California, were duly exemplified, and the various depositions introduced in evidence herein were duly taken and certified to.

After the admission of said exhibit, the defendant's attorney asked the said Judge this question: "Your Honor admits simply the judgment roll, not the transcript on appeal so far as it contains super-
150e fluous papers," and the said Judge replied: "I will admit the whole." Whereupon the defendant's attorney, then and there, took his exception to said ruling.

Thereupon the defendant's attorney admitted as a fact, for the purposes of the trial, that the plaintiff was a citizen of the State of California.

Thereupon one Fielding L. Marshall was duly sworn as a witness in behalf of the plaintiff.

Thereupon the said Judge ruled that interest upon said judgment should be calculated at the rate of seven per cent. until January 1, 1880, and at the rate of six per cent. thereafter. Thereupon the said witness testified as follows:

150f "I have calculated the interest on this judgment from its date until the 1st of January, 1880, from the date of the entry of judgment in California, to January 1, 1880. The amount, $8,394.46. The amount of interest at 6 per cent. from January 1, 1880, until date is $13,095.19. The total amount is $21,489.65. The total of principal and interest is $38,533.29."

Thereupon the plaintiff's attorney made the following statement: "The introduction of the judgment roll rather lays it on me to introduce on the

direct what I intended to introduce on the rebuttal. 151
Consequently, I will now offer in evidence the matter constituting the estoppel. I offer to read in evidence the deposition of Southard Hoffman." Thereupon the defendant's attorney objected to the offer and to the deposition upon the ground that evidence of estoppel is immaterial, incompetent and irrelevant. Whereupon the Judge ruled that the deposition should be read, and then defendant's attorney, then and there, noted an exception to such ruling.

Thereupon the plaintiff's attorney read from the said deposition of Southard Hoffman and all of the deposition as read, is hereinafter set forth, and the following proceedings were had upon the read- 152
ing of such deposition:

The plaintiff's attorney read the following:

"My name is SOUTHARD HOFFMAN; my age is 50 years. I reside in San Francisco, and am by occupation Clerk of the United States District Court for the Northern District of California. I have been such Clerk for thirteen years.

Q. 3. Have you examined the records of your office in the matter of bankruptcy of Erwin Davis, with reference to the order filed in that case October 31, 1876, with a view to find whether any appeal has been taken from that order?

Thereupon defendant's attorney, Mr. Kenneson, 153
objected to said question 3, as immaterial, irrelevant, incompetent and inadmissible under the issues in this action. The defendant's attorney further objected to any evidence bearing on the proceedings in bankruptcy. Whereupon the said Judge admitted said testimony, and the defendant's attorney, then and there, noted his exception.

Thereupon the said Judge made a ruling that the defendant's attorney should be allowed the same objections and exceptions to all of the questions put to the said Southard Hoffman, without making them separately.

154 Thereupon the plaintiff's attorney read the answer to said question 3, which was as follows:

"A. I have carefully read every entry in the docket in bankruptcy in that case, from and after October 31, 1876, and find no such appeal to be entered therein."

Plaintiff's attorney then again read from said deposition.

Q. 4. Will you now look at the paper shown you, being a paper endorsed "563 U. S. District Court, in the Matter of Erwin Davis, Bankruptcy, Stipulation and agreed statement of facts, filed August 15, 1876, 11.20 A. M., Southard Hoffman, Clerk, by A. D.
155 Grimwood, Deputy Clerk," and state whether it came from the records of your office?

To this question, the defendant's attorney, Mr. Kenneson, objected as immaterial, irrelevant and incompetent and inadmissible under the issues, which objection the said Judge overruled, and the defendant's attorney then and there noted his exception.

The plaintiff's attorney read the answer to said question 4, as follows:

"That paper comes from the files in the case referred to, and I compare the date of filing with the entry in the bankruptcy docket, showing them to be identical, and showing this paper to have been on
156 file."

Mr. Maltby thereupon read the following question in said deposition:

"Q. 5. Will you look at the paper now shown you, endorsed '563 U. S. District Court, District of California, *in re* Erwin Davis, in Bankruptcy; notes of argument on motion to cancel proofs of debt and to dismiss specifications of opposition of P. B. Cornwall and H. P. Wakelee, filed July 20, 1876, Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' and state whether that is on file in your office?"

Thereupon the defendant's attorney, Mr. Kenne- 157
son, objected to said question as immaterial, irrelevant and incompetent and inadmissible under the issues, and the said judge overruled said objection. Whereupon the defendant's attorney then and there noted his exception.

The plaintiff's attorney thereupon read the answer to said question 5, which was as follows:

"Yes, sir."

Thereupon the plaintiff's attorney read the following question in said deposition:

"Q. 6. When was it so filed in this matter of Erwin Davis in Bankruptcy?"

Thereupon defendant's counsel objected to said 158
question as irrelevant, immaterial and incompetent, and inadmissible under the issues, and the said Judge overruled said objection, and the defendant's counsel then and there noted an exception to said ruling.

Plaintiff's counsel thereupon read the answer to said question, which was as follows:

"July 20, 1876."

Thereupon the following proceedings were had:

"Mr. Maltby: I offer in evidence the document marked Plaintiff's Exhibit Facts. This was used on the motion before the Bankruptcy Court, and contains a statement of the facts. It is an agreed 159
statement of facts, signed by both plaintiff's and defendant's counsel."

"Mr. Kenneson: I object to it as immaterial, irrelevant, incompetent and inadmissible under the pleadings."

"The Court: Your objection is a general one and a particular one."

Mr. Kenneson: "But I now make my objection to that paper specifically, as irrelevant, immaterial and incompetent and inadmissible under the pleadings."

160 Whereupon the said Judge admitted said paper in evidence, and the defendant's counsel, Mr. Kenneson, then and there noted his exception.

The said paper called Plaintiff's Exhibit Facts, reads as follows:

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER

161 OF

ERWIN DAVIS in Bankruptcy.

The following facts are hereby stipulated to be correct and true:

1st. That the petition and schedules of Erwin Davis was filed September 11, 1869.

2d. That he was adjudicated bankrupt by Register Bates, who has since died, September 30, 1869.

162 3d. That H. P. Wakelee made proof of debt November, 1869, and amended his proof July 6, 1870.

4th. That P. B. Cornwall made proof of debt in November, 1869, and amended his proofs July 6, 1870.

5th. That H. P. Wakelee filed petition to be allowed to bring action in State Courts, June 28, 1873.

6th. That P. B. Cornwall filed a similar petition July 25, 1872.

7th. That the Court granted the orders asked for in said petitions. 163

8th. That after said orders were made the said Wakelee and Cornwall commenced actions against Davis in the State Courts and obtained judgments for the amounts sued for, and that they both subsequently brought suits on said judgments in France, and in said actions in France caused property to be attached. These actions have been removed to England by consent of parties and are still pending. The judgments were obtained in California and actions commenced in France prior to the filing of petition for discharge.

164

9th. Petition for discharge filed December 23, 1875.

10th. Both Wakelee and Cornwall filed opposition to the petition for discharge without cancellation of their judgments or the dismissal of their actions in France, and subsequently a motion was made to expunge the proof of debt and dismiss the opposition of both.

JOS. NAPHTHALY, and
W. H. L. BARNES,
Solicitors for opposing creditors.
J. P. HOGE,
R. THOMPSON,
CALEB DORSEY,
Attys. for Erwin Davis.

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Thereupon the plaintiff's attorney offered in evidence a paper called Plaintiff's Exhibit Notes. Whereupon, the defendant's attorney objected to the admission of the same upon the ground that it was irrelevant, immaterial and incompetent and inadmissible under the issues, and thereupon the said Judge overruled said objection and admitted said paper; to which ruling defendant's attorney then and there noted his exception.

166 The said paper, Plaintiff's Exhibit Notes, reads as follows:

In re ERWIN DAVIS.

Hoge.

In re WILLIAMS,
1 Am. L. Times R. 107-113, 2 N. B. R.
6 N. B. R. 388,
102 Mass., 472.
27 Maine, 441.
15 Gray, 547.

WALCOTT vs.
In re MONTGOMERY,
3 B. R., 426.
5 B. R., 353.

167 Napthaly.

(Endorsed)—Filed July 20, 1876.—Southard Hoffman, Clerk.—By A. D. Grimwood, Deputy Clerk.

Thereupon the plaintiff's attorney read in evidence the deposition of W. H. L. Barnes, the whole of which, as read, now follows, and to the questions in which the following objections were taken:

"My name is William H. L. Barnes; my age, 52 years. I reside in San Francisco, Cal., and I am by occupation an attorney-at-law. I was admitted to the Bar of the State of New York in the year 1860. I came to California in 1863, arriving here on Tuesday
168 afternoon of April 28th, about four o'clock. The next day but one I was admitted to the Bar of this State and tried my first case, and since then I have been in active practice here. I knew the complainant, Pierre B. Cornwall, in 1869, and up to 1881 very well. I acted in some of these years as attorney and counsel for Pierre B. Cornwall.

"Q. 6. In what matter?"

Defendant's attorney, Mr. Kenneson, objects to this question as incompetent, immaterial, irrelevant and inadmissible under the issues in this action.

Objection overruled; to which defendant's 169
counsel noted an exception.

"A. I was his general attorney."

"Q. 7. Did you act specially as attorney in the matter of Erwin Davis in Bankruptcy, pending in the United States District Court for the District of California?"

Mr. Kenneson, the defendant's counsel, makes the same objection. The said Judge makes the same ruling, and defendant's attorney notes an exception.

"A. I did."

The said Judge thereupon made an order that 170
the defendant's counsel should have the same objection and exception to all of the various questions in the said depositions.

"Q. 8. Was this defendant, Erwin Davis, that bankrupt?"

Same objection, ruling and exception.

"A. Certainly."

"Q. 9. Who was his regular attorney in that matter in bankruptcy?"

Same objection, ruling and exception.

"A. Well, R. Thompson, Esq., here present, acted for him. Caleb Dorsey, of Tuolumne County, 171
represented him, and Col. Hoge, now Judge Hoge, also represented him, and I think there were one or two more. I don't remember, but those gentlemen I especially remember.

"Q. 11. General, did you act for Pierre B. Cornwall in said matter in bankruptcy in reference to an application for leave to sue the bankrupt?"

Same objection, ruling and exception.

"A. Yes, sir.

"Q. 12. Please look at the papers now shown you, endorsed 'District Court of the United States, Dis-

172 trict of California, 563 in Bankruptcy, in the Matter of Erwin Davis, Bankrupt. Petition of Pierre B. Cornwall and Notice of Motion. Service of within notice and a copy petition by copy admitted this 26th day of July, A. D. 1872. R. Thompson, Attorney for said Bankrupt. Filed July 27, 1872, Edward B. Cotter, Clerk, by A. D. Grimwood, Deputy Clerk.' And also paper endorsed '563 United States District Court of the District of California, in the Matter of Erwin Davis, in Bankruptcy. Order allowing Pierre B. Cornwall to commence suit against Bankrupt. Filed July 30, 1872, at 11.30 A. M. Edward B. Cotter, Clerk, by A. D. Grimwood, Deputy Clerk.' And say whether those
173 papers embody the proceedings taken by you on such application for leave to sue?"

Same objection, ruling and exception.

"A. Those are the papers which were prepared in my office for that purpose."

"Q. 13. And the order of the Court made thereon?"

Same objection, ruling and exception.

"A. Yes."

"Q. 14. Did you act as counsel for said Cornwall in a certain proceeding in said Court, to oppose the discharge in bankruptcy of said bankrupt?"

Same objection, ruling and exception.

174 "A. I did."

"Q. 17. Please look at the paper now shown you, endorsed 563.—United States District Court.—In the Matter of Erwin Davis, Bankrupt.—Opposition of P. B. Cornwall to Bankrupt's discharge.—Filed February 23, 1876, at 3.15 P. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.—J. Naphthaly and Delos Lake, by mistake for W. H. L. Barnes, solicitors for contestants, and state whether that embodies the opposition proceeding taken by you as counsel for said Cornwall?"

Same objection, ruling and exception.

"A. It does." 175

"Q. 18. Was that document prepared in your office?"

Same objection, ruling and exception.

"A. Yes; I think so."

"Q. 19. General, did you represent Pierre B. Cornwall in certain proceedings taken in said matter in said Court to set aside the objection of Pierre B. Cornwall to the discharge of the bankrupt, and to dismiss his proofs of debt."

Same objection, ruling and exception.

"A. Yes, sir."

"Q. 20. Please look at the paper now shown you, 176
endorsed 563.—In the United States District Court. —In the Matter of Erwin Davis, Bankrupt.—Petition and Notice of Motion as to Pierre B. Cornwall. —Filed March 18, 1876, at 11.55 A. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk. —R. Thompson, attorney for Bankrupt, and say whether that is the original petition and notice of motion filed on the part of said bankrupt?"

Same objection, ruling and exception.

"A. It appears to be the petition, and has my admission of service on it."

"Q. 21. Please look at the document now shown you, endorsed: No. 563.—U. S. District Court.—In 177
the Matter of Erwin Davis, Bankrupt. Stipulation and agreed statement of Facts.—Filed August 15, 1876, at 11.20 A. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk," and state if you recognize the signatures thereto?"

Same objection, ruling and exception.

"A. I do."

"Q. 22. Will you say you signed the same?"

Same objection, ruling and exception.

"A. Well, I can tell you by whom it appears to be signed.

178 Q. 23. Well, you recognize the signatures. I want to prove the handwriting of the gentlemen who signed it?

Same objection, ruling and exception.

"A. My impression is that Mr. Naphtaly signed for himself, and myself, and Caleb Dorsey signed for himself and the others. That is my impression. Upon further examination I say that for our side Mr. Naphthaly signed for himself and me, and for the other side Caleb Dorsey signed for all the counsel.

"Q. 24. Was that document submitted to the Court on the motion to dismiss?"

179 Same objection, ruling and exception.

"A. Yes, sir.

"Q. 25. Was the motion submitted for decision upon the statement of facts contained in it after argument?"

Same objection, ruling and exception.

"A. Yes.

"Q. 26. General, you were present in Court during the argument of said motion?"

Same objection, ruling and exception.

"A. Yes.

"Q. 27. Who else was present as counsel?"

180 Same objection, ruling and exception.

"A. Both sides were represented by counsel. I think Colonel Hoge was there. Mr. Dorsey was there. Mr. Thompson was there. I was there, and Naphthaly was there.

"Q. 28. Who represented the side of Pierre B. Cornwall?

Same objection, ruling and exception.

"A. Naphthaly and myself.

"29. Will you please state what was said by the counsel for Davis on the argument of that motion,

in open Court, so far as you can recollect--all that took place, so far as you can recollect?" 181

To this question defendant's attorney, Mr. Kenneson, made the following objection:

"I object to that. My point is this: Of course, ultimately this is going to lead up to the order which cancelled the proof of debt and struck out the specifications of opposition, and contention is to be made that that order is *res adjudicata*. The oral argument before Judge Hoffman is offered here for the purpose of showing what was decided. The arguments of counsel are no evidence whatever."

Thereupon the said Judge, after hearing read in evidence Judge Hoffman's order, ruled that he would admit the argument of counsel referred to and the evidence as to the oral argument upon such motion; to which the defendant's attorney then and there excepted. 182

The defendant's attorney, furthermore, specially objected that there is no statement of the actual argument, but only of the gist of it, and that it was incompetent to prove the oral argument in this way. Whereupon the said Judge overruled the said objection, to which the defendant's attorney then and there excepted.

"A. Well, the case was sharply contested and thoroughly argued. I would not undertake to recite the authorities that were cited nor to reproduce the speeches. They were all lengthy and able. The gist of the whole matter was and Mr. Hoge said Cornwall and Wakelee, having, subsequent to Mr. Davis's petition in voluntary bankruptcy, obtained leave to sue him upon the notes made by Mr. Davis before his petition was filed, and having sued and having obtained judgments against the bankrupt, those judgments constituted, in each case, a new obligation or liability not included within the schedule of Davis' debts at the time his petition was filed, 183

184 and therefore not affected by his discharge in bankruptcy, and Cornwall and Wakelee were not parties in interest and were not affected in any way, whether or not his discharge was granted. In support of this assertion he cited and read numerous authorities.

Q. 30. General, in view of the objections just interposed, do you remember the exact language used by the counsel for Davis on the argument of said motion?"

Defendant's counsel objects to said question as incompetent, irrelevant and immaterial, and for the feregoing reasons. Objection overruled. Exception.

185 "A. By no means.

Q. 31. Will you give them, to the best of your recollection, the substance of that language?"

Same objection, ruling and exception.

"A. Well, Colonel Hoge made quite an elaborate argument. Many authorities were cited in support of his view, which I can only state briefly, or as I stated before, the gist or point of his argument, which was that the opposing creditors having obtained leave to sue Mr. Davis subsequent to his petition in voluntary bankruptcy, and having sued and obtained judgments against him in a Court of competent jurisdiction in this State, that these creditors had no concern with the question whether
186 or not he was to be discharged in bankruptcy, for the reason that the judgments constituted a new obligation or debt, not existing at the time of Davis' petition, and therefore not to be affected by his discharge.

Q. 32. Was Colonel Hoge the leading counsel for defendant, Davis, on that motion?"

Same objection, ruling and exception.

"A. I would not say so in the presence of Judge Thompson.

Q. 33. I mean the counsel who argued the case?"

Same objection, ruling and exception.

"A. Well, yes. I think he did more of the discussion than the other gentlemen. I think Colonel Hoge made the principal argument. Such is my recollection. He generally does. 187

Q. 34. Referring now to the order which has just been introduced in evidence, cancelling proofs of of debt, and dismissing and disregarding the opposition of Pierre B. Cornwall, did Pierre B. Cornwall acquiesce in said order?"

Same objection, ruling and exception.

"A. Yes.

Q. 35. Was there ever any appeal from said order?"

Same objection, ruling and exception. 188

"A. No.

Q. 36. General Barnes, do you know why no appeal was taken by Pierre B. Cornwall from the order dismissing and disregarding his specifications of objection?

Same objection, ruling and exception.

"A. I do.

Q. 37. Will you please state what that reason was?

Same objection, ruling and exception.

"A. At the time the judgments were obtained 189
the case of Hahn against Kelly, reported in the Thirty fifth Californian Reports, established the law of this State with reference to the presumption of verity upon a judgment roll. That is to say, a judgment roll reciting service would be assumed by the law to be personal service. Hence our judgments when recovered were considered good. Subsequently, and within a short time after these judgments were recovered, the Supreme Court of the United States in the case of Galpin *vs.* Page, and later on in Pennoyer *vs.* Neff, decided that such was not the presumption, and that jurisdiction of the

190 person of a defendant could not be acquired by a Court of this State outside of its territorial limits by publication of the summons, except in cases where you could attach property and then proceed only against the *rem*. This decision changed, of course, the law of this State, because in later cases the Supreme Court of this State decided that although Hahn *vs.* Kelly had held the other way, yet as the Supreme Court of the United States in Galpin *vs.* Page and Pennoyer *vs.* Neff had held the other way they would hereafter follow the rule laid down by the Supreme Court of the United States and avoid a conflict. Now, all that, except the case of Pennoyer *vs.* Neff, I knew in 1876, when we had
191 this contest before Judge Hoffman, but inasmuch as we had obtained a judgment valid upon its face in December of 1872, and up to the date of the opposition in July or August, 1876, Mr. Davis had made no movement to set aside these judgments, I believed that they would still stand, because he could not move them or disturb them on account of his own laches. I thought we would be able to make them stick, as we did, later on. Subsequently an application was made by Mr. Davis to Judge Dwinelle of the District Court of California in and for the Fifteenth Judicial District, for leave to reopen these cases and plead his discharge in bankruptcy. Judge Dwinelle, though fully informed of the fact
192 that we had been prevented from resisting discharge in bankruptcy by reason of these judgments so obtained, for reasons not made known and extremely unsatisfactory to me, did permit him to reopen both of these judgments and plead his discharge in bankruptcy against the judgments which the District Court of the United States had said could not be affected by it. From that order of Judge Dwinelle's I appealed to the Supreme Court of this State, and it very promptly reversed him."

Q. 38. Did Pierre B. Cornwall ever appear in said proceedings in bankruptcy, after the order dismissing his opposition?"

Same objection, ruling and exception.

"A. No. 193

Q. 39. Did he, at any time after that, ever attempt to oppose the discharge of said bankrupt?"

Same objection, ruling and exception.

"A. No.

Q. 40. Referring now to the judgment recovered by Pierre B. Cornwall under the order of leave to sue, dated December 18, 1872, in the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, will you please state whether Pierre B. Cornwall, after the recovery of said judgment, took any steps with relation to the collection of the same? 194

Same objection, ruling and exception.

"A. He did.

"Q. 41. Will you please state what those steps were?"

Same objection, ruling and exception.

"A. The representative of Henry Kimber & Co., a firm of solicitors doing business in London, was here upon some business of his firm, relating to a sale of California mining properties in London, in which, if I remember right, Erwin Davis was somehow concerned. At all events, from what Mr. Storrey, the representative of Kimber & Co., said to 195 me, I intrusted to him, for Kimber & Co., the judgments in these cases, properly exemplified, so as to enable Kimber & Co., representing Cornwall and Wakelee and another creditor, to bring suit and prove the cases in England or anywhere else Erwin Davis might be found. He took the documents with him to England, and as I am informed by Kimber & Co. and believe, as well as by the payment of their bills of expenses incurred in the litigation, Davis was sued upon these judgments, through the instrumentality or agency of Kimber & Co.

196 Q. 42. Do you know in what country ?"

Same objection, ruling and exception.

"A. Originally in England, and then as he was reported to have a large amount of money or bonds in France, he was pursued there and the securities were attached. Subsequently, by agreement, for economic reasons, I believe, the whole matter was retransferred to England. That is as near as I remember. Of course I was not there and took no part in it, and only gather it up now from hearsay.

Q. 43. General, did you, at the time of these several proceedings taken by you, acquaint Pierre B. Cornwall with them?

197 Same objection, ruling and exception.

"A. Both Cornwall and Wakelee were thoroughly aware of everything that went on and took a lively interest in the pursuit of Mr. Davis.

Q. 44. Did you fully advise them of the effect of these proceedings?"

Same objection, ruling and exception.

"A. Yes, as fully as we generally do our clients. Both of them were intelligent men, Mr. Cornwall particularly so, and they understood the business as well as I did.

Q. 45. In your answer to question 37, you have
198 spoken of a reversal of the Supreme Court of California of an order of Judge Dwinelle. Will you please look at the document now shown you, purporting to be transcript on appeal and certified copy of remittitur in the case of Cornwall *vs.* Davis, in the Supreme Court of California, and state whether they are the proceedings that you have referred to in your answer to question 37?"

Same objection, ruling and exception.

"A. I hold in my hand a transcript on appeal from the Fifteenth District Court to the Supreme Court of the State of California, in the case of Corn-

wall *vs.* Davis, which is the transcript on appeal in 199
the matter to which I have here alluded."

"Q. 46. Do you know of any other matters or thing to the interest of the plaintiff in this suit? If so, will you please testify to the same as though you were particularly interrogated thereto?"

Same objection, ruling and exception.

"A. I know of nothing except that the English action, brought by Pierre B. Cornwall, was discontinued without a trial upon the merits, and the reason it was discontinued was that the expense of the litigation so far had been so great that it did not seem that the amount that we would realize, if we were completely successful in the action, would 200
equal the expense of recovery."

During the reading of the deposition of the said W. H. L. Barnes, the plaintiff's attorney, offered various documentary evidence, the proceedings upon which were as follows:

The plaintiff's attorney offers in evidence the document marked Plaintiff's Exhibit Leave, consisting of a petition for leave to sue, notice of motion and the order thereon. The defendant's attorney objected to the same as immaterial, irrelevant and incompetent, and inadmissible under the issues.

Whereupon the said Judge overruled said objec- 201
tion, and admitted said paper, to which the defendant's attorney then and there excepted.

The said Plaintiff's Exhibit Leave reads as follows:

202 IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS in Bankruptcy.

To Messrs. THOMPSON & WILSON, Attorneys for the
203 bankrupt, Erwin Davis:

You will please take notice that on behalf of P. B. Cornwall, a creditor of said bankrupt, I shall move this Honorable Court, at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 30th day of July, A. D. 1872, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for permission to enforce the collection, payment and satisfaction of the claims of petitioner (which are fully set out in his petition) by proper and necessary actions and suits at law and in equity, in any State or country having jurisdiction of the person and property of said Erwin Davis, and for any other and further relief to which petitioner
204 may be entitled.

The motion will be made upon the annexed petition of which a correct copy is herewith served on you and upon the files, records, papers and proceedings in the above entitled matter.

Dated San Francisco, July 26, A. D. 1872.

W. H. L. BARNES,
Atty. for P. B. Cornwall.

IN THE DISTRICT COURT OF THE UNITED STATES 205

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS in Bankruptcy.

TO THE HONORABLE OGDEN HOFFMAN, JUDGE OF THE SAID DISTRICT COURT OF THE UNITED STATES: 206

The petition of Pierre B. Cornwall respectfully represents unto your Honor as follows, that is to say:

That on or about September 11, 1869, Erwin Davis above named, then being a resident of the District of California, filed his petition in bankruptcy in this Honorable Court, pursuant to the provisions of the Act of Congress of the United States, entitled "An Act to establish a uniform system of Bankruptcy throughout the United States, approved March 2d, A. D. 1867, and the Acts amendatory thereof and supplementary thereto, praying that he might be adjudged by the Court to be a bankrupt within the purview of said act, and that he might be decreed to have a certificate of his discharge from all his debts provable under the same. 207

That on or about September 30, 1869, the said Davis was thereupon duly adjudged a bankrupt by Asher B. Bates, Esq., a Register in Bankruptcy, to whom said petitioner had been referred by said Court.

That one William Burling of said City and County of San Francisco, was on or about November 17, 1869, duly appointed by said Asher B. Bates, Register in Bankruptcy, as aforesaid, as-

signee in bankruptcy of the estate of the said Davis.

That the said William Burling duly qualified and entered upon the discharge of his duties as such assignee and that he is still acting as such. That on or about November 19, 1869, the said Register executed an instrument in writing by which he assigned all the estate, real and personal of the said Davis, with all his deeds, books and papers relating thereto to the said William Burling, assignee as aforesaid; that at the time of filing said petition in bankruptcy by the said Davis he was indebted to your petitioner in large sums of money as follows, to wit:

The sum of twenty-five hundred and seventy-three dollars and seventy cents ($2,573.70) due on the 25th day of September, 1869, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 26th day of August, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit A."

Also a certain other sum of twenty-eight hundred dollars ($2,800) due on the 25th day of October, 1869, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 25th day of October, A. D. 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit b."

Also a certain other sum of twenty-eight hundred dollars ($2,800) due on the 24th day of November, 1869, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 24th day of November, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit c."

Also a certain other sum of twenty-eight hun-

dred dollars ($2,800) due on the 24th day of December, 1869, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 24th day of December, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit d." 211

Also a certain other sum of twenty-eight hundred and ten dollars ($2,810) due on the 23d day of January, 1870, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 23d day of January, 1870, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit e." 212

That your petitioner made due proof of said debts as required by the Act of Congress aforesaid, and duly filed the same in the said proceedings in bankruptcy with the said Assignee. That your petitioner was, on the said September 11, 1869, and ever since has been the owner and holder of said promissory notes and each of them.

Your petitioner has been informed and believes, and charges the fact to be that, except a small amount of personalty of but little value surrendered to the said Assignee by the said Davis, all his property was incumbered by mortgages and liens of various descriptions, amounting to much more than the value of the same; 213

That no part of the estate of said bankrupt which came to the hands of his said Assignee has been distributed among or to any of the creditors of the estate whose claims were unsecured (of which claims your petitioner's is one);

That there will be, as your petitioner is informed and believes, and therefore charges on such information and belief, no assets or other thing from said property to be distributed among such creditors as himself. That the property of said bankrupt which

214 came to the hands of the said Assignee is wholly insufficient to discharge the liens and incumbrances thereon and the costs of the proceedings in bankruptcy, and that your petitioner's claims are wholly due and unpaid.

That, although said Davis was duly adjudicated a bankrupt, as aforesaid, he has made no application to the Court for a discharge from his debts, which delay on his part is unreasonable and fraudulent, as well as unnecessary, if ever he intends to apply for a discharge, which he does not intend to do, according to your petitioner's information and belief.

That your petitioner is informed and believes, and therefore charges upon such information and belief,
215 that said Davis fraudulently concealed the account books and memoranda relating to his estate and effects, and fraudulently neglected and failed to deliver the same to his said Assignee, although often requested by him so to do. That he did not surrender or deliver all of his property to his said Assignee, but wilfully and fraudulently concealed some portion thereof.

That your petitioner is advised and believes that said Davis could not obtain a final discharge from his debts if he were to apply therefor to this Honorable Court by reason of his having committed the fraudulent acts above set forth and many other acts in contravention of the letter and spirit of the Act of
216 Congress hereinbefore mentioned. That your petitioner is informed and believes, and therefore charges the fact to be, that since the filing of his said petition in bankruptcy said Davis has acquired a large amount of property and estate in the State of New York and elsewhere, of the value of not less than one hundred thousand dollars, which is held by him in his own name and right or by others whose names are unknown to petitioner, but in trust for him.

That all or most of said property can be reached by the requisite proceedings and subjected to the

payment of your petitioner's just claims and de- 217
mands.

That your petitioner's claims and demands above mentioned will be barred by the Statute of Limitations in force in the State of New York, where said Davis is now reputed to reside, unless he shall speedily commence proceedings there against said Davis, and he will therefore be unable to enforce the payment thereof in the State of New York or from instituting the proper proceedings to reach the said bankrupt's estate.

Wherefore your petitioner prays that leave may be granted to enforce the collection, payment and satisfaction of his said claims and demands, and for such purpose to institute and maintain all requisite 218
and necessary actions and suits at law and equity against the said bankrupt Erwin Davis, as he may be advised in any Court or Courts, in any State or country having jurisdiction of the person or property of the said Erwin Davis and for such further and other relief as may be agreeable to equity. And as in duty bound your petitioner will ever pray, &c.

WM. H. L. BARNES,
Attorney for Petitioner.

City and County of San Francisco, }
State of California, } ss:

PIERRE B. CORNWALL, being duly sworn, deposes and says he is the petitioner mentioned and referred 219
to in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

P. B. CORNWALL.

Subscribed and sworn to this 26th day of July, A. D. 1872, before me }

EDWD. B. COTTER,
U. S. Commissioner.

220 **SCHEDULE OF EXHIBITS.**

REFERRED TO IN FOREGOING PETITION.

"Exhibit A."

$2573 $\frac{70}{100}$. SAN FRANCISCO, Augt. 26, 1869.

On the 25th day of September, 1869, at three o'clock P. M. of that day (no grace) for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California, in this City, twenty-five hundred and seventy-three $\frac{70}{100}$ dollars with interest
221 from date at the rate of one per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

(Endorsed)—P. B. Cornwall.—Protested San Francisco, Septr. 25, 1869, for non-payment.—E. N. Joice, Notary Public—$4.25.—June 6, 1870, Recd. $1407.43.

Exhibit B.

$2,800.00 SAN FRANCISCO, August 26, 1869.

On the 25th day of October, 1869, at three o'clock,
222 P. M. of that day (no grace) for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California, in this City, Twenty-eight hundred dollars with interest after due at the rate of one per cent per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

(Endorsed—P. B. Cornwall.—San Francisco, October 25, 1869.—Protested for non-payment.——$4.25.—E. N. Joice, Notary Public.

Exhibit C.

223

$2,800.00. SAN FRANCISCO, August 26, 1869.

On the 24th day of November, 1869, at three o'clock P. M. of that day (no grace) for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California, in this City, Twenty-eight hundred dollars with interest from after due at the rate of one per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

224

(Endorsed)—P. B. Cornwall.—Demand for payment. —Notice of non-payment and protest waived.— P. B. Cornwall.

Exhibit D.

$2,800.00. SAN FRANCISCO, August 26, 1869.

On the 24th day of December, 1869, at three o'clock P. M of that day (no grace) for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at 225
the Bank of California, in this City, Twenty-eight hundred dollars with interest from after due at the rate of one per cent. per month, until paid, payable monthly, both principal and interest in the like gold coin.

ERWIN DAVIS.

(Endorsed)—P. B. Cornwall.—Demand for payment. —Notice of non-payment and protest waived.— P. B. Cornwall

226 **"Exhibit E."**

$2,810.00. San Francisco, August 26, 1869.

On the 23rd day of January, 1870, at three o'clock P. M. of that day (no grace) for value received in gold coin of the Government of the United States, I promise to pay to the order of P. B. Cornwall, at the Bank of California, in this City, Twenty-eight hundred and ten dollars with interest from after due at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

Erwin Davis.

227 (Endorsed)—P. B. Cornwall.—Demand for payment.—Notice of non-payment and protest waived.—P. B. Cornwall.

(Endorsed)—Filed July 27th A. D. 1872 at 10.55 A. M.—Edwd. B. Cotter, Clerk, by A. D. Grimwood, Deputy.—Service of within notice and copy of petition admitted this 26th day of July A. D. 1872.—R. Thompson, Attys. for sd. Bkpt.

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of California.

228

In the Matter

of

Erwin Davis in Bankruptcy.

In this matter Pierre B. Cornwall, a creditor of the bankrupt herein, having heretofore filed his petition praying for leave to commence such actions at

law and suits in equity as he may be advised against the said bankrupt for the recovery of the claims and demands held by said creditor against the said bankrupt set forth in said petition, and said petition coming on to be heard this day, the said petitioner appearing by his attorney, W. H. L. Barnes, Esquire, and the said bankrupt by his attorney, R. Thompson, Esquire; 229

Now, on this 30th day of July, A. D. 1872, after hearing the respective parties, on motion of W. H. L. Barnes, Esquire, it is ordered, that the said Pierre B. Cornwall have leave and leave is hereby granted to commence any action or actions at law or suits in equity against Erwin Davis, the bankrupt herein, as he may be advised in any court or courts in any State or county having jurisdiction of the person or property of the said Erwin Davis. 230

Dated San Francisco, California, the 30th day of July, A. D. 1872.

OGDEN HOFFMAN,
District Judge.

(Endorsed)--Filed July 30th, 1872, at 11.30 A. M.--Edwd. B. Cotter, Clerk, by A. D. Grimwood, Deputy Clerk.

The plaintiff's attorney offered in evidence Plaintiff's Exhibit Opposition. The defendant's attorney objected to the same as incompetent, irrelevant and immaterial, and the said Judge overruled the said objections, to which the defendant's attorney then and there excepted. 231

The said Plaintiff's Exhibit Opposition reads as follows:

232 IN THE DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF CALIFORNIA.

IN THE MATTER

OF

ERWIN DAVIS, Bankrupt.

233 And now comes P. B. Cornwall and respectfully shows to this Honorable Court:

1st. That he is a creditor of said Erwin Davis, bankrupt.

2d. That he has duly proved his claim against the estate of said bankrupt in the manner provided by law.

3d. That he opposes the petition of said bankrupt from a discharge of the debts and liabilities and having duly filed his appearance on the return day set by the Court for the hearing of said petition for a discharge, presents the following grounds and
234 specifications of opposition to the discharge of said bankrupt.

I.

That said bankrupt has concealed his books relating to his estate and effects.

II.

That said bankrupt being a merchant and trader, has not, subsequent to the passage of the Act of Bankruptcy referred to in his said petition, kept proper books of account.

III. 235

That he has procured the assent of G. A. Treadwell, of Wm. J. Bryan, of G. F. Bragg, of Marsh Pillsbury & Co., of J. W. Perkins and W. G. Taylor, of J. W. Perkins, of Wm. Thompson, Jr., and W. G. Taylor, of William Dean & Co., of C. L. Place & Co., of Robert Hannigan, of H. H. Hill, of the London and San Francisco Bank, Limited, a foreign corporation doing business at San Francisco, in the State and District aforesaid, of C. J. Pillsbury, said persons being creditors of Erwin Davis, bankrupt, and of each and every of them, to his discharge in bankruptcy by pecuniary consideration and obligations.

236

IV.

That he has influenced the action of the creditors named in specification III. and of each of them with reference to his discharge in bankruptcy by pecuniary considerations and obligations.

V.

That said Erwin Davis has been guilty of fraud contrary to the true intent of the Act of Congress referred to in his said petition in this: In that the said Erwin Davis, having been duly summoned and required to appear for the purposes required by Section 26 of said act, did clandestinely and fraudulently and while said examination was pending and in progress, abscond and depart from this State and District, and said Erwin Davis has ever since remained absent and out of the jurisdiction of this Court and of the jurisdiction of the Courts of the United States of America. 237

And this contestant respectfully shows to this Honorable Court that said Erwin Davis is not entitled to have and receive from this Court his discharge in bankruptcy, because said Erwin Davis has not in all things conformed to his duty under said act in this, that said Erwin Davis, having been adjudged a

238 bankrupt on his own petition, and having been subject to the orders of this Court, said Erwin Davis was duly summoned and required to appear before the Register in bankruptcy before whom these proceedings were pending, to be examined on oath upon matters relating to the disposal or condition of his property, and generally for the purposes required by Section 26 of said Act of Congress; that pending his said examination, and during and adjournment of such an examination, the said Erwin Davis, without leave of Court or that of his creditors, or of his Assignee in bankruptcy, or of any other person having authority to grant such leave or consent, withdrew himself from such examination an clandestinely
239 and fraudulently departed from this State and went out of the jurisdiction of this Court and departed for Europe, where said Erwin Davis has ever since been.

That by reason thereof, said Erwin Davis was not fully examined as required, and by reason of his said absence this opposing creditor has not been able to avail himself of his rights to examine said bankrupt in accordance with the provisions of said Section 26 and of the provisions of said bankrupt act.

That such withdrawal occurred in the year 1870, and said Erwin Davis has ever since that time remained absent. Wherefore, this contestant prays that the application of said bankrupt for his dis-
240 charge in bankruptcy be denied.

J. NAPHTHALY and
W. H. L. BARNES,
Solicitors for Contestant.

(Endorsed)—Filed February 23rd, 1876, at 3.15 P. M. —Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.

The plaintiff's attorney offered in evidence Plaintiff's Exhibit "Petition to Dismiss," to which the defendant's attorney objected as immaterial, irrelevant and incompetent, and the said Judge overruled the

said objections and admitted the same, and the de- 241
fendant's attorney then and there excepted.

The said Plaintiff's Exhibit Petition to Dismiss reads as follows:

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF CALIFORNIA.

IN THE MATTER
OF
ERWIN DAVIS, a Bankrupt. 242

To P. B. CORNWALL, Esq., and J. NAPHTALY and W. H. L. BARNES, his attorneys.

You will please take notice that upon behalf of Erwin Davis, the above named bankrupt, I shall move this Honorable Court at the court room thereof, in the City and County of San Francisco, on Tuesday, the 28th day of March, 1876, at the opening of the Court on that day, or as soon thereafter as counsel can be heard for an order cancelling the proof of debt heretofore made in the above entitled cause, against the estate of the said Erwin 243
Davis, by P. B. Cornwall, and to dismiss and disregard the specifications of opposition filed by the said P. B. Cornwall to the discharge of the said Erwin Davis in bankruptcy.

The motion will be made upon the annexed petition, of which a correct copy is herewith served upon you and upon the files, records, papers and proceedings in the above entitled matter.

Dated San Francisco, March 17, 1876.

R. THOMPSON,
Atty. for Petitioner.

211 IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF CALIFORNIA.

IN THE MATTER OF ERWIN DAVIS, a Bankrupt.	In Bankruptcy.

245 And now comes Erwin Davis, the above named bankrupt, by his attorney, R. Thompson, and moves the Court for an order cancelling the proof of debt heretofore made in the above entitled cause against the estate of the said Erwin Davis by P. B. Cornwall, and to dismiss and disregard the specifications of opposition filed by the said P. B. Cornwall to the discharge of the said Erwin Davis in bankruptcy, on the following grounds, that is to say:

The said P. B. Cornwall, on or about the 26th day of July, A. D. 1872, and after he had proved up his debt or claim against the said estate of Erwin Davis, petitioned this Court for, and on or about the 30th day of July, A. D. 1872, obtained from this Court an
246 order granting leave to the said P. B. Cornwall to commence any action or actions at law or suits in equity against the said Erwin Davis, the bankrupt herein, as he may be advised in any State or country having jurisdiction of the person or property of the said Erwin Davis.

That thereafter, to wit, on or about the 2d day of August, A.D. 1872, the said P. B. Cornwall commenced an action in the Fifteenth Judicial District Court, in and for the City and County of San Francisco, against the said Erwin Davis, for the same cause of action on which he had proved up his debt in the said bankruptcy proceedings, and in the due course of the

said action the said P. B. Cornwall obtained a judg- 247
ment of the said Fifteenth Judicial District Court in his favor, and against the said Erwin Davis, which said judgment still stands of record in said Fifteenth District Court, and is in full force.

R. THOMPSON,
Att'y for Petitioner.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.:

R. THOMPSON, being duly sworn, both depose and say: That he is the attorney for the above-named bankrupt, Erwin Davis; that he has read the foregoing petition and the statement on which the same is based, and that the facts set forth in said statement 248
are true of his own knowledge.

R. THOMPSON.

Subscribed and sworn to before me this 18th day of March, A. D. 1876. }

DAVID LYON,
Commissioner of U. S. Circuit Court,
Dist. of California.

Service of within is hereby admitted this 18th day of March, 1876.

J. NAPHTHALY,
W. H. L. BARNES,
Att'ys for Contestant.

249

(Endorsed).—Filed March 18th, 1876, at 11.55 A. M. —Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.

Plaintiff's attorney offered in evidence "Plaintiff's Exhibit Facts," which was objected to as immaterial, irrelevant and incompetent, which objection was overruled, and the defendant excepted. This exhibit is elsewhere shown herein.

Plaintiff's attorney offered in evidence the order made by Judge Hoffman, granting said motion to dismiss, to which the defendant's attorney objected

as immaterial, irrelevant and incompetent, and the said Judge overruled the said objection, to which the defendant's attorney then and there excepted.

The said order reads as follows:

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF CALIFORNIA.

IN THE MATTER OF ERWIN DAVIS, a Bankrupt.	In Bankruptcy.

The matter of the motion of Erwin Davis, the above named bankrupt, for an order cancelling the proof of debt heretofore filed in this Court by P. B. Cornwall against the said estate, and for an order dismissing and disregarding the specifications of oppositions, filed by the said Cornwall to the final discharge of the said Davis in bankruptcy coming on regularly to be heard, and it having been argued by the attorneys for the respective parties and duly submitted upon the proofs taken, and it having been considered by the Court:

It is hereby ordered, adjudged and decreed that all proofs of debt heretofore made and filed in this Court by P. B. Cornwall against the estate of Erwin Davis, a bankrupt, be and the same are hereby cancelled; and it is further ordered, adjudged and decreed that the specifications of opposition heretofore filed in this Court to the final discharge of Erwin Davis in bankruptcy by P. B. Cornwall, be and the same are hereby dismissed and set aside, and shall in all things hereafter be disregarded.

OGDEN HOFFMAN,
Dist. Judge.

(Endorsed)—Filed October 31, 1876, at 11.20 A. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.

The plaintiff's attorney offered in evidence plaintiff's Exhibit Transcript, to which the defendant's attorney objected as immaterial, irrelevant and incompetent, and the said Judge overruled the said objection; to which the defendant's attorney then and there excepted. This exhibit is shown heretofore herein. 253

Thereupon the plaintiff's attorney offered to read the deposition of JOSEPH NAPHTALY, to which the defendant's attorney objected on the ground that the same was irrelevant, immaterial and incompetent and inadmissible under the issues, and the said Judge overruled the said objection; to which the defendant's attorney then and there excepted.

Thereupon the plaintiff's counsel read the said deposition, and to each and every question and cross-question, the defendant's counsel objected on the ground that it was irrelevant, immaterial and incompetent and inadmissible under the issues, and in each case the said Judge overruled the said objections, to which the defendant's counsel in each instance duly excepted. 254

The said deposition is as follows: All that was read being now set forth.

"Q. 1. State your name, age, place of residence and occupation.

A. My name is Joseph Naphtaly; my age, forty-seven years; I reside in San Francisco, and am by profession a practicing attorney-at-law. 255

Q. 2. How long have you been engaged in your profession as an attorney-at-law?

A. Since 1865.

Q. 3. In this city?

A. Yes, sir.

Q. 6. Are you acquainted with Pierre B. Cornwall of this City and County?

A. Yes, sir; I know him.

Q. 7. Mr. Naphtaly, did you act in any of those years as attorney and counsellor for Pierre B. Cornwall?"

256 Defendant's counsel objects to said question as immaterial, irrelevant and incompetent, and not within the issues. Said Judge overruled said objection, and the defendant's attorney, then and there, excepted.

"A. I acted as such at a certain time. I don't know the exact year. I think it was in 1875 or 1876.

Q. 8. In what matter?"

Same objection, ruling and exception.

"A. In connection with General Barnes, as attorney for Cornwall and Wakelee in the bankruptcy proceedings of Erwin Davis that were then pending
257 in the United States District Court of this State.

Q. 9. Was the said Erwin Davis, bankrupt, the defendant in this case?"

Same objection, ruling and exception.

"A. That I don't know.

Q. 10. Who was his regular attorney in the matter in bankruptcy?"

Same objection, ruling and exception.

"A. Judge Robert Thompson.

Q. 11. Anybody else appear for him?"

Same objection, ruling and exception.

258 "A. In the bankruptcy case, I think J. P. Hoge, a present Judge of the Superior Court of this city and county, assisted Judge Thompson in certain matters in that case, but I don't know whether he acted throughout the entire case.

Q. 12. Do you recollect any one else at any time who appeared in that proceeding as attorney for the bankrupt?"

Same objection, ruling and exception.

"A. I have an idea that Caleb Dorsey, of Tuolumne County, appeared for him, but I am not sure.

Q. 14. Did you act as attorney for Pierre B. Corn-

wall in said matter of bankruptcy, in reference to 259
an application for leave to sue the bankrupt?"

Same objection, ruling and exception.

"A. I cannot remember unless I look at the record.

Q. 15. Did you act as counsel for Pierre B. Cornwall in a certain proceeding in said court to oppose the discharge in bankruptcy of said bankrupt?"

Same objection, ruling and exception.

"A. In connection with General Barnes, I did.

Q. 16. Please look at the paper now shown you, endorsed: '563 U. S. District Court.—In the Matter of Erwin Davis, Bankrupt.—Opposition of Pierre B. Cornwall to bankrupt's discharge.—Filed January 260
23d, 1876, at 3.15 P. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.—J. Naphtaly and Delos Lake, Solicitors for Contestant,' a certified copy of which document is in evidence herein, marked 'Plaintiff's Exhibit Opposition,' and state whether that embodies the proceedings taken by you and Mr. Barnes, as counsel in opposition to the application?"

Same objection, ruling and exception.

"A. This paper is in opposition to the discharge of Erwin Davis, written by my clerk, Mr. I. P. L. Brandt, now an attorney of this city, but my clerk then. It is signed by myself and Mr. Barnes, as 261
solicitors for contestant. I drew the opposition and gave my clerk the paper to copy, and this is his copy.

Q. 17. Did you represent Pierre B. Cornwall in a certain proceeding taken in said matter in said court to set aside the objection of Pierre B. Cornwall to the discharge of the bankrupt and to dismiss his proofs of debt?"

Same objection, ruling and exception.

"A. By reference to the petition now handed me, I see that these papers were served upon me as one of the attorneys in the case by Judge Robert Thomp-

262 son, and service admitted by my clerk in my name and in the name of General Barnes. The admission of service is in my clerk's writing. I also hold in my hand a certified copy of that document which is marked with the title of this case, 'Plaintiff's Exhibit Petition to Dismiss.' I make the same answer with reference to the petition for an order of Court to cancel the proof of debt made in the Erwin Davis case by Mr. Wakelee and served upon me. The admission of service is made in the name of General Barnes and myself by my clerk. I hold in my hand a certified copy of that paper, marked with the title of this case, 'Plaintiff's Exhibit Petition to Dismiss.'

Q. 18. Please look at the paper now shown you,
263 endorsed '563 U. S. District Court.—In the Matter of Erwin Davis, Bankruptcy.—Stipulation and agreed statement of facts.—Filed August 15, 1876, at 11.20 A. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' and state if you recognize the signatures thereto, a certified copy of which paper is also handed to you, which is introduced in evidence in this case and marked 'Plaintiff's Exhibit Facts?'"

Same objection, ruling and exception.

"A. I recognize the signatures of 'Joseph Naphtaly' and 'W. H. L. Barnes' as being in the handwriting of my clerk, Mr. Brandt, and signed by him under authority of General Barnes and myself. The
264 signatures of J. P. Hoge, Judge Thompson and Caleb Dorsey I don't know in whose handwriting they are, although the writing looks like that of Judge Thompson.

Q. 19. Was the document submitted to the Court on a motion to dismiss?"

Same objection, ruling and exception.

"A. It was.

Q. 20. Was the motion submitted for decision upon the statement of facts contained in it after argument?"

Same objection, ruling and exception.

"A. I believe it was. By reference to the document I find that to be the fact. The endorsement upon the back of this paper, 'and agreed statement of facts,' is in the handwriting of Mr. Grimwood, the deputy clerk of the Court at that time. 265

Q. 21. Were you present in court during the argument of said motion to dismiss?"

Same objection, ruling and exception.

"A. I was.

Q. 22. Who else was present as counsel?"

Same objection, ruling and exception.

"A. I recollect only Judge Hoge, Judge Thompson, General Barnes and myself. 266

Q. 23. Will you please state who these gentlemen respectively represented?"

Same objection, ruling and exception.

"A. Judge Thompson was the chief counsel for Mr. Davis; Judge Hoge was, as I understand, an assistant of Judge Thompson's in that matter. General Barnes and myself appeared for the creditors, Cornwall and Wakelee.

Q. 24. Were these motions of the bankrupt, Davis, to dismiss the objections of Cornwall and Wakelee, heard together?

Same objection, ruling and exception.

267

"A. I believe they were heard together. They were based upon the same statement of facts, and I believe they were heard together.

Q. 25. Will you please state what was said by the counsel for Davis on the argument of the motion in open court, so far as you can recollect?"

Defendant's counsel objects to this question specially upon the ground that there is only the gist or substance stated; that the argument should be stated not in substance, but as it occurred; that this objection is made in addition

268 to the general objection to each question, as above stated. Thereupon the said Judge overruled the said objection; to which the defendant's counsel then and there excepted.

"A. That is too much of a question to ask me at this time of life. I remember, of course, some parts of it. Judge Hoge appeared in the case, and made the chief argument in the case; that is, Judge Thompson yielded to Judge Hoge in making the argument of the case. I remember Judge Hoge being there with an unusually large number of books. I think Judge Thompson also argued the matter. I said something in reply, and I believe I filed some authorities
269 in the case, or, rather I filed a reply to the authorities cited by Judge Hoge. I have looked over my papers in my office and have had my clerk make a diligent search for that brief, but I find nothing there; but unquestionably I must have said something in reply to their motion, because it was something new at the time. I suppose bankruptcy proceedings did not change the character of indebtedness, even if judgment was recovered afterwards. I have not been able to find any copy of my brief among my papers. I only find one single paper among my papers relating to that matter, and that is a list of the creditors. Since the time of the argument of that motion I have moved my office, and am as-
270 sociated with other gentlemen as attorneys, and that brief may still be in existence, together with the other papers, but I have not been able to find them, although I have looked for them wherever I was likely to find them.

Q. 26. Will you please state the substance, as far as you can recall it, of what was said by counsel for the bankrupt Davis on the argument of that motion to dismiss?"

Same objection, ruling and exception.

"A. I can tell you only generally what was claimed. The motion to dismiss was made upon the

ground that these gentlemen had procured a judg- 271
ment and had taken themselves out of the jurisdiction of the Bankruptcy Court by trying to improve their condition, and that having done so—I believe it was claimed there was an attachment levied at that time upon some things, somewhere, but I am not distinct in my recollection upon that subject; my best impression is that that was one of the points suggested—that these creditors had, by bringing the suit and attaching the property, taken themselves out of the jurisdiction of the Bankruptcy Court voluntarily, and that they had no right to prevent Mr. Davis's discharge by reason thereof. We claimed, on the other hand, that it did not make any difference; that the debt had not been merged 272
in the judgment so as to drive them out of the Court, so to speak, and not allow them to participate in the proceedings against Davis. We were apprehensive that the discharge in bankruptcy would discharge the judgment debt just the same as it would have discharged the original debt as it existed at the time of filing the petition. Judge Hoge strenuously argued that that was not so; that the new judgments would not be discharged by the bankruptcy proceeding, and that we would lose nothing by it. That, in substance, according to my recollection, is what occurred in Court at that time.

Q. 27. Mr. Naphtaly, in view of the objections 273
just interposed by counsel, will you please state, so far as you can, and confine your answer to what was stated in Court by Judge Hoge on the argument in question?"

Same objection, ruling and exception.

"A. Of course it is impossible for me to give all that was said or even the exact language of anything that was said. The petitions and papers on file show what was before the Court; and when I say 'It was claimed' I mean to say it was said by the moving party that the motion made by them should be

granted for the reason that the two creditors had taken themselves without the jurisdiction of the Bankruptcy Court, had brought suit and, I think, attached certain property of Erwin Davis, and that any discharge obtained in a bankruptcy court would not discharge that judgment and the creditors would not be affected by it.

Q. 28. Do you know whether an order was subsequently entered upon the motion to dismiss?"

Same objection, ruling and exception.

"A. I know Judge Hoffman decided the case, but I did not draw any order, because the order was not in my favor. The paper that you have just handed to me is a paper having the signature of Honorable Ogden Hoffman, District Judge, appended thereto, and is, of course, the order that he signed in the matter. I have in my hand a certified copy of the said order, which is marked in this case 'Plaintiff's Exhibit Cancellation.'

Q. 29. Referring to the order that you have just looked at, did Pierre B. Cornwall accept and acquiesce in said order?"

Same objection, ruling and exception.

"A. He did. He certainly had to. There was no appeal taken from this order. It was perfectly satisfactory to General Barnes, under whose instruction I mainly acted in this case. I was only called into the case because he believed I had had more experience in bankruptcy proceedings than he had had. I was not the regular attorney for these gentlemen. General Barnes was.

Q. 30. Do you know whether Pierre B. Cornwall ever afterwards, in any way, appeared in said bankruptcy proceeding to oppose or set aside said discharge?"

Same objection, ruling and exception.

"A. I don't know anything about it. My connection with these claims ended with that order.

Q. 31. Mr. Naphtaly, will you please state why this decision on the motion was satisfactory to you and General Barnes?" 277

Same objection, ruling and exception.

"A. It was satisfactory to me because it was satisfactory to General Barnes, and to General Barnes it was satisfactory because he thought, as far as I recollect, that it was a pretty good thing to have a judgment against Erwin Davis, because he was a man of great talents and ability to make a great deal of money and a man of vast resources, and that decision suited him. It only suited me because I followed instructions.

Q. 32. Did you consider that, after that order dismissing and setting aside the opposition of Pierre B. Cornwall, gave you a valid judgment against Davis?" 278

Same objection, ruling and exception.

"A. As far as Judge Hoffman's decision could make it; of course I didn't think he was right, but his decision certainly was final in that case, because no appeal has been taken from it.

Q. 33. Mr. Naphtaly, did you advise your clients as to the effect that this order would have upon their judgment?"

Same objection, ruling and exception.

"A. No, sir; I did not. I don't know whether I ever spoke to them about it. I know Gen. Barnes and I talked about the matter, and he let it rest where it was. He was willing to take Judge Hoffman's decision in this matter as a matter in favor of his clients. 279

CROSS-EXAMINATION:

Q. 1. Mr. Naphtaly, you and Mr. Barnes did what you could to prevent the entry of this order, by way of argument, did you not?

Same objection, ruling and exception.

280 A. We did everything that was proper to be done.

Q. 2. It was argued fully on the side of Mr. Cornwall and Mr. Wakelee?

Same objection, ruling and exception.

"A. Argued thoroughly.

Q. 3. And everything that could be done on their behalf was done to avoid the entry of this order cancelling their proofs?"

Same objection, ruling and exception.

"A. Everything that could be done in a Court of Justice to present both sides of the case was done both by Judge Thompson, who was very energetic
281 in the matter and ourselves, and the Court decided against us.

Q. 4. How then, is it that the final order was so satisfactory to Gen. Barnes?"

Same objection, ruling and exception.

"A. The final order was satisfactory because it had to be satisfactory, and Gen. Barnes said, really that the resources of Mr. Davis were so great, and that he was a man of such great activity of mind and intellect that he would not rest a poor man, and that sooner or later he would get up in the world again and pay his debts, and Mr. Barnes was satisfied with the decision of the Court.

282 REDIRECT:

Q. 9. You were asked on cross-examination why you were satisfied with the order dismissing objection of the creditors. Was it the fact that all the creditors then before the Court considered the judgments they had obtained in the State Courts as valid?"

Same objection, ruling and exception.

"A. Well, I can only answer that in the way I have stated before. The judgments were valid, but we had an idea that the discharge in bankruptcy

would discharge that judgment as well, but then the 283
Court decided otherwise. Gen. Barnes, who was really the representative of these parties, was satisfied with the decision, and took no steps to set it aside, because he thought he could make his judgment at some future time. In fact, he was glad that he lost his case."

Thereupon the plaintiff's counsel offered to read in evidence the deposition of Judge Hoffman, to which the defendant's attorney objected, upon the ground that the same was irrelevant, incompetent and immaterial and not within the issues, and the said judge overruled the said objection to which the the defendant's attorney then and there excepted.

Plaintiff's attorney proceeded to read the said de- 284
position of OGDEN HOFFMAN, which is as follows, and the whole of which as read is here given:

"Q. 1. Judge, will you please state your age, residence, and your occupation?

A. I am sixty-seven years of age. My residence is San Francisco, and I am United States District Judge for the Northern District of California.

Q. 2. How long have you been such judge?

A. Since February 28, 1851.

Q. 3. Will you please look at the papers now shown you, endorsed '563. In the U. S. District Court. In the matter of Erwin Davis, bankrupt. Petition and notice of motion as to opposition of Pierre B. Cornwall, filed March 18, 1876, at 11.55 285
A.M. Southard Hoffman, clerk, by A. D. Grimwood, Deputy Clerk. R. Thompson, attorney for bankrupt,' a certified copy of which has been offered in evidence in this case with the deposition of General Barnes, marked 'Plaintiff's Exhibit Petition to Dismiss,' and state whether you presided on the decision of said motion, and whether the order now shown you, endorsed, 'U. S. District Court, in the matter of Erwin Davis, bankrupt. Order cancelling proofs and setting aside opposition of Pierre B. Cornwall. Filed October 31, 1876, at 11.20 A. M. Southard Hoffman, Clerk, by A. D. Grimwood,

286 Deputy Clerk,' a certified copy of which has been introduced in evidence in this case with the deposition of General Barnes, and marked 'Plaintiff's Exhibit Order of Cancellation,' and state whether that order was signed by you?"

Objected to as irrelevant, immaterial and incompetent and not within the issues. Objection overruled by said judge; to which defendant's attorney then and there excepted.

"A. This motion was made in the District Court before me. The order produced seems, from its endorsement, to be taken from the files of the Court, and I recognize my signature to it. This notice of
287 motion appears to have been taken from the files of the Court. I cannot prove that. The motion was made before me, and I believe argued the same time of the proceeding.

Q. 4. Will you please look at the paper now shown you, endorsed '563 U. S. District Court, District of California. *In re* Erwin Davis, in Bankruptcy. Notes of argument on motion to cancel proofs of debt and to dismiss specifications of opposition of P. B. Cornwall and H. P. Wakelee. Filed July 20, 1876. Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk,' which document has been identified by Southard Hoffman, Esquire, Clerk of this Court, in his deposition in this matter, and
288 marked for identification 'Plaintiff's Exhibit Notes,' and state whether the same is in your handwriting?"

Same objection, ruling and exception.

"A. I have no present recollection of the authorities that were cited to me upon that argument, but I recognize my handwriting. These notes were taken by me undoubtedly at the time, that is to say, I have no doubt it was at the time, because they could not have been taken otherwise. I have no recollection of it, but I recognize my handwriting. I find that these notes were filed and duly endorsed among the records of the Court.

Q. 5. Can you say from the memorandum made by you who appeared before you in the argument?" 289

Same objection, ruling and exception.

" A. I find here Colonel Hoge, a present Judge of the Superior Court in this city and county, noted as counsel on one side, and Mr. Naphtaly, as the other. I presume that they must have appeared. I have no doubt of it. I have no doubt that they represented the respective parties, but I have no recollection of the matter.

Q. 6. Are you able to say what authorities were cited by Judge Hoge on the argument, refreshing your recollection by the paper now in your hands, and above referred to?" 290

Same objection, ruling and exception.

A. I have no recollection, refreshed or otherwise, but I observe that this is in my handwriting, and I have no doubt, from seeing my memorandum here, that those authorities were cited, but I cannot say that it refreshes my recollection, because my recollection is absolutely blank on the subject. It is only as to this paper that I testify to, and my recollection of my handwriting, together with the file on the face of this memorandum as it appears on the records of the Court duly endorsed as 'Notes of Argument.'"

Thereupon the plaintiff's attorney offered to read the deposition of Robert Thompson, whose deposition was taken on behalf of Erwin Davis, in the suit in equity; to which the defendant's attorney objected on the ground that it was irrelevant, immaterial and incompetent, and not concerning any matter within the issues, and the said Judge overruled the said objection, to which the defendants's attorney then and there excepted. 291

Thereupon the plaintiff's attorney read the said deposition and the following proceedings were had thereon. As to each question asked the defendant's attorney objected on the ground that

292 it was irrelevant, immaterial and incompetent and not within the issues, and the said Judge, as to each question, overruled said objection, and thereupon, as to each question the defendant's attorney then and there noted an exception.

The whole of said deposition, as read, is here given:

"Q. 1. State your name, age, place of residence and occupation.

A. My name is Robert Thompson. My age sixty-seven years. I reside in San Francisco, and am by occupation an attorney-at-law.

Q. 2. How long have you been such attorney? A. About thirty years.

293 Q. 3. In this State?

A. Yes, sir.

Q. 4. Did you know Pierre B. Cornwall?

A. No, sir; I did not know Mr. Cornwall.

Q. 5. Did you know H. P. Wakelee?

A. Yes, sir.

Q. 6. In or about the year 1869 and subsequent thereto?

A. Yes, sir; I knew him before that, and afterwards.

Q. 7. Were you acquainted with Erwin Davis about those times?

A. I was.

Q. 8. Did you act for him in any capacity; if so, what?

294

Objected to as irrelevant, immaterial and incompetent. Objection overruled. Exception.

A. I did. I acted as his attorney in the bankruptcy proceeding in the United States District Court for the District of California.

Q. 9. At what time?

Same objection, ruling and exception.

A. My first consultations with him were, I think in the first part of 1869. The petition was filed in September, 1869. I was first employed by him in

the matter at least six months before the filing of 295
this petition.

Q. 10. You remained his attorney through all those bankruptcy proceedings?

Same objection, ruling and exception.

A. I did.

Q. 11. Do you remember proceedings had in that matter, wherein Pierre B. Cornwall and Henry P. Wakelee filed specifications of opposition to the discharge of Davis, and the objection was made thereto on the part of Mr. Davis in the contest which ensued thereon?

Same objection, ruling and exception. 296

A. I do.

Q. 12. Who acted with you as attorney for the bankrupt in those proceedings, if anyone?

Same objection, ruling and exception.

A. After about 1875, and when we were about to proceed with the petition for Davis' discharge, Judge Caleb Dorsey from Tuolumne County, and Joseph P. Hoge were associated with me in the matter for Mr. Davis.

Q. 13. Were you present at the argument which ensued upon the motion to strike out those oppositions?

Same objection, ruling and exception. 297

A. I was.

Q. 14. Will you state as nearly as you can what was said by counsel for the bankrupt in the argument of that question?

Same objection, ruling and exception.

A. Do you mean the language they used?

Q. 15. Yes; the language that was used.

Same objection, ruling and exception.

A. No, sir, I couldn't do that.

298 Q. 16. Well, will you give us to the best of your recollection the language that was used—the arguments used?

Same objection, ruling and exception.

A. I can give you the general purport, but I couldn't remember the language used.

Q. 17. Well, give it?"

To this question the defendant's attorney specifically objected upon the ground that the gist or substance of what occurred is called for and that the witness should testify to the argument and that the objection was in addition to the objections heretofore mentioned. Whereupon the said Judge over-
299 ruled the said objection, and the defendant's attorney then and there excepted.

A. There were four oppositions filed to Mr. Davis' discharge by four different individuals. One by Mr. Cornwall, one by Mr. Wakelee, another by E. A, Head, and the fourth by James G. Fair. Joseph Naphtaly, who has testified in this case, was the attorney connected with the opposition in each one of the four cases. When the oppositions were filed I examined into them and moved to set aside three out of the four on different grounds, but the grounds of the Wakelee and Cornwall oppositions were the same. The four specifications of opposition were identically alike—one seemed to be copied from the
300 other verbatim. The Wakelee and Cornwall oppositions I moved to set aside on the ground that they had obtained a judgment in the District Court of the State of California after the petition in bankruptcy had been filed, and that that judgment stood of record, the ground appearing on the paper itself. I drew it myself and filed it. I based the motion on a case decided by Judge Lowell in Massachussetts, found reported in the Fifth Bankruptcy Register, I think, on page 353, being entitled *in re* Gallison *et al.*, which was to the effect that a party having proved his debt in bankruptcy, and subsequently going into a State Court and obtaining a judgment, could not

file opposition, or was not entitled to file and be 301
heard in opposition to the bankrupt's discharge, unless he filed a stipulation that he would abide by a decision of the United States Courts on the question of discharge; but, if he filed that stipulation that he would discharge the judgments in case the bankrupt obtained his discharge in the United States Courts, that he would allow them to remain. As I viewed the case at the time, it was to compel them to choose between remaining in the United States Court and depending upon defeating Mr. Davis in his discharge, or to get out of the United States Court and take their chances in the State Court under that judgment. As they had filed with their opposition no stipulation to satisfy their judgments 302
in the State Court, in my view they had no standing in the Bankruptcy Court, and could not have unless the Court permitted them afterwards to file such stipulation. No such stipulation was ever filed.

On the hearing of my petition to dismiss their opposition and cancel their debt, Judge Hoge made the principal argument on the part of Mr. Davis. Mr. Dorsey read the stipulation as to facts, which stipulation has already been introduced in evidence herein, and, I think, made some short argument. General Barnes and Mr. Naphtaly argued it on the other side. The facts covered by the stipulation were all conceded. There was no controversy as to facts. The question before the Court was simply a 303
legal question growing out of those facts. The question was an unsettled question, even under the old bankrupt acts before that of 1867. Some of the courts had held that judgments obtained on old debts that existed at the time of the filing of the petition in bankruptcy, on which judgments have been obtained, were discharged by a discharge in bankruptcy, and others had held the reverse; and the same was true, under the act of 1867, at that time. Judge Hoffman, in those cases, held that they were not discharged, and therefore dismissed the oppositions.

304 Q. 18. Was there any argument upon that hearing with regard to the validity of the judgments in the State Court independent of the bankruptcy proceedings?

Same objection, ruling and exception.

A. I remember nothing of the kind. I do not think the question was raised at all before the Court. I have no recollection of its being alluded to.

Q. 19. I will ask you, then, was the question raised by the attorneys for Pierre B. Cornwall or by the attorneys for the bankrupt, as to whether these judgments were valid or invalid in the State Court,
305 independent of the bankruptcy proceeding?

Same objection, ruling and exception.

A. I have no recollection of the validity of the judgments having been referred to in that argument. It was not a contested point in the case, as far as I recollect. My impression is that the validity of the judgments was assumed by all parties and by the Court.

Q. 20. If that question had been raised and argued, you would have been likely to recollect it now, wouldn't you?

Same objection, ruling and exception.

306 A. Oh, yes. I recollect every point that was made in the case.

Q. 21. What makes you think that the validity of the judgments was assumed, as you say, by all parties?

Same objection, ruling and exception.

A. Merely the fact that I do not remember that it was argued at all or alluded to.

Q. 24. At the time of the decision of that contest with regard to striking out the opposition of Cornwall and Wakelee, was anything said by their attorneys with regard to that decision, and with re-

gard to whether they would appeal from it or otherwise; if so, what? 307

Same objection, ruling and exception.

A. There was some conversation. I had a conversation with Mr. Naphtaly, and he said they were perfectly satisfied with the order of Judge Hoffman.

Q. 25. Do you think of anything else pertaining to the issues in this case which you have omitted? If so please state?

Same objection, ruling and exception.

A. I don't think of anything else."

Thereupon the plaintiff's attorney offered to read 308
notice of motion to vacate judgment. Whereupon the defendant's attorney objected to the same as immaterial, incompetent, irrelevant and inadmissible, and on the ground that it was entirely subsequent to the judgment, and the said Court overruled the said objection. Whereupon the defendant's attorney then and there excepted.

The said notice of motion to vacate judgment is printed as a part of Exhibit Transcript.

Thereupon the plaintiff's attorney offered to read a certain injunction granted in this Court in favor of Pierre B. Cornwall and against the said Erwin Davis, defendant. Whereupon defendant's attorney objected thereto as irrelevant, immaterial and 309
incompetent, whereupon the said Judge overruled said objection; to which the defendant's attorney then and there noted an exception.

The said injunction reads as follows:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to ERWIN DAVIS, his heirs, executors, administrators, assigns, attorneys, agents and servants, greeting:

Whereas, it has been represented to us in our Circuit Court of the United States for the Southern

310 District of New York, in the Second Circuit, on the part of Pierre B. Cornwall, complainant, that he has lately exhibited his bill of complaint in our said Circuit Court for the Southern District of New York, against you, the said Erwin Davis, to be relieved touching the matters therein complained of; in which bill it is stated, among other things, that you are threatening and intending to injure the said complainant, touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience.

We therefore, in consideration thereof and of the particular matters in said bill set forth, do strictly command and perpetually enjoin you, the said
311 Erwin Davis, your heirs, executors, administrators, assigns, attorneys, agents and servants, and each and every of you, under the pains and penalties which may fall upon you and each of you in case of disobedience, that you do absolutely forthwith and forever desist and refrain from claiming, alleging, or setting up by answer, demurrer, plea or other defense, or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form in any action at law or suit in equity or in any other proceeding whatever, in this or any other jurisdiction, and from in any manner or form whatsoever and wheresoever maintaining against the complainant, Pierre B. Cornwall, his heirs, executors, admin-
312 istrators and assigns, or any or either of them, that the judgment given, made, or entered by and in the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco, on the 18th day of December, 1872, in an action wherein Pierre B. Cornwall was plaintiff and said Erwin Davis was defendant, in favor of said Pierre B. Cornwall, and against said Erwin Davis, for the sum in United States gold coin of seventeen thousand and three $\frac{52}{100}$ dollars, with interest thereon from said date, till paid, at the rate of seven per cent. per annum, together with said plaintiff's costs and disburse-

ments incurred therein, amounting to the sum of forty $\frac{12}{100}$ dollars, was not duly given, made, or entered by a Court having competent jurisdiction thereof, is not valid, or does not still stand of record in said District Court, and is not in full force against said defendant, Erwin Davis, his heirs, executors, administrators and assigns, or any and every of them, pursuant to the prayer of said bill of complaint. 313

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States at the City of New York, in the said District, this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
Clerk. 314

[L. S.] ANSON MALTBY,
Solicitor for Complainant.

Whereupon the plaintiff's attorney then and there closed the plaintiff's *prima facie* case.

DEFENDANT'S CASE.

Mr. Thaddeus D. Kenneson, defendant's attorney, thereupon opened the case for the defendant, and offered in evidence a certified copy of the certificate of final discharge of Erwin Davis as a bankrupt. Whereupon the said Judge admitted said certificate in evidence. 315

The said certificate reads as follows:

316 IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CALIFORNIA.

IN THE MATTER OF ERWIN DAVIS, a Bankrupt.	No. 563, in Bankruptcy.

317 In this matter the petition of Erwin Davis, the bankrupt herein, for his final discharge herein, being heretofore, to wit, on the 18th day of January, A. D. 1876, brought on for hearing, and ten days having been given to creditors to file specifications of opposition, and further time having been given by stipulation, to wit: to and including the 23d day of February, A. D. 1876, in which to file such opposition, and the time having fully expired, and no one excepting E. A. Head, H. P. Wakelee, James G. Fair and P. B. Cornwall having filed specifications of opposition to said bankrupt's discharge, and the specifications of the said E. A. Head, H. P. Wakelee and P. B. Cornwall having been dismissed
318 and set aside by order of this Court, duly made and entered, to wit: The opposition of E. A. Head on the 28th day of April, A. D. 1876; the opposition of the said H. P. Wakelee and P. B. Cornwall on the 31st day of October, 1876, and the specifications of opposition of James G. Fair having been duly referred to Samuel J. Clark, Jr., Esq., one of the Registers of this Court in Bankruptcy, to take the proofs therein and report to this Court thereon, and the said Register having taken the proofs therein, and having reported to this Court on the same, and the

matter having been fully argued and submitted to 319
the Court for consideration and decision, and the Court, after fully considering the same, finds the said specifications of opposition of James G. Fair to the discharge of the said bankrupt not sustained.

Now, therefore, on motion of R. Thompson, of counsel for said Erwin Davis, bankrupt, as aforesaid, it is hereby

Ordered, adjudged and decreed that the specifications of opposition of James G. Fair aforesaid, be and the same hereby are overruled and dismissed, and that the default of all the creditors of said bankrupt, who failed to file specifications of opposition be and the same is hereby entered, and on further motion of counsel for said bankrupt, and it appear- 320
ing from the certificate of Samuel J. Clark, Jr., Esq., Register of this Court in Bankruptcy aforesaid, that the assent of at least one-fourth of the creditors of said bankrupt in number and at least one-third in value to whom he, the said bankrupt, is liable as principal debtor, and who have proved their claims in accordance with the provisions of the bankrupt act, have assented in writing, which said written assent is now on file herein, to the discharge of said bankrupt as prayed for.

It is further hereby ordered, adjudged and decreed that this Court do grant, and it hereby does adjudge, decree and grant to the said Erwin Davis 321
a discharge from all his debts, except as in said act provided, and it is further ordered, adjudged and decreed, that a certificate of such discharge, under the seal of this Court in due form, be immediately signed by the Judge of this Court and given to the said bankrupt.

OGDEN HOFFMAN.
Dist. Judge.

(Endorsed)—Filed March 6, 1877, at 2.25 P. M.—Southard Hoffman, Clerk, by A. D. Grimwood, Deputy Clerk.

322 I, SOUTHARD HOFFMAN, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the "order overruling and dismissing opposition of James G. Fair, and granting discharge," filed March 6, 1877, at 2.25 P. M., in the matter entitled "In the Matter of Erwin Davis, a Bankrupt," No 563, in the United States District Court, Northern District of California, and now remaining on file and of record in my office.

Attest my hand and seal of said District Court this 18th day of December, A.D. 1889.

L. S.] SOUTHARD HOFFMAN,
323 Clerk.
By A. D. GRIMWOOD,
Deputy Clerk.

Whereupon the defendant's attorney requested the Court to direct a verdict for the defendant Erwin Davis, and the plaintiff's attorney requested the Court to direct a verdict in the sum named in favor of the plaintiff and against the defendant.

Whereupon the said Judge granted the plaintiff's motion and directed the jury to render a verdict for the plaintiff for $38,533.29.

Whereupon the defendant's attorney excepted to such direction.

324 Whereupon the said Judge denied the motion of the defendant's attorney to direct a verdict in favor of the defendant, and the defendant's attorney then and there duly excepted to such denial.

Thereupon the said jury, pursuant to said direction, rendered a verdict in favor of the plaintiff and against the defendant in the sum of $38,533.29.

This bill of exceptions contains all the evidence given upon the trial, of every kind, and is a record of all proceedings thereon.

Aud inasmuch as the said matters, produced and given in evidence on the said trial, and the said exceptions do not appear by record of the said cause in

the Circuit Court of the United States for tha Southern District of New York, the defendants have prepared and caused to be settled this bill of exceptions as a record thereof, in accordance with the statutes of the United States, which said bill of exceptions the said Court hereby signs and orders on file this 28th day of December, 1892. 325

N. SHIPMAN,
Circuit Judge.

(Endorsed)—U. S. Circuit Court, So. Dist. of New York.—Pierre B. Cornwall against Erwin Davis.—Bill of Exceptions.—Logan, Clark & Demond, Attys. for Deft.—58 William St., N. Y.—U. S. Circuit Court.—Filed Jan. 4, 1893.—John A. Shields, Clerk. 326

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PIERRE B. CORNWALL,
Plaintiff and Defendant in error,

AGAINST

ERWIN DAVIS,
Defendant and Plaintiff in error. 327

ASSIGNMENT OF ERRORS.

The defendant and plaintiff in error, Erwin Davis, by his attorneys, Logan, Clark & Demond, pursuant to the rules and practice of the courts of the United States, hereby assigns the following errors committed in this cause, and says that in the record and proceedings herein there are manifest errors in this, to wit:

328 I.

The Court erred in denying the defendant's motion to compel the plaintiff to elect on which of the four counts in his complaint he would go to trial, and in holding that he could go to trial on all four counts.

II.

The Court erred in admitting in evidence the judgment roll and transcript on appeal in the suit brought by Pierre B. Cornwall against Erwin Davis in California, and in holding that the same was evidence for any purpose against the defendant upon the issues herein.

329 III.

The Court erred in admitting in evidence the whole transcript of said record last mentioned, instead of simply admitting the judgment roll.

IV.

The Court erred in admitting in evidence the deposition of Southard Hoffman, and in holding that the same was evidence for any purpose against the defendant upon the issues herein.

V.

The Court erred in admitting the answers to the following questions put to the said Southard Hoff-
330 man in said deposition: Questions 3, 4, 5 and 6, the substance of his testimony being with respect to certain papers on file in the matter of the bankruptcy of the defendant, and in holding that said answers were evidence against the defendant for any purpose upon the issues herein.

VI.

The Court erred in admitting in evidence the "Plaintiff's Exhibit Facts," and in holding that said exhibit was evidence for any purpose against the defendant upon the issues herein.

VII. 331

The Court erred in admitting in evidence "Plaintiff's Exhibit Notes," and in holding that said exhibit was evidence for any purpose against the defendant upon the issues herein.

VIII.

The Court erred in admitting in evidence the deposition of W. H. L. Barnes, and in holding that said deposition was any evidence whatsoever against the defendant upon the issues herein.

IX.

The Court erred in admitting the answers to the 332
following questions put to the said W. H. L. Barnes in said deposition, to wit: Questions 6, 7, 8, 9, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46; said answers and testimony being in substance with respect to the proceedings in bankruptcy taken by the defendant in California; the application made by Pierre B. Cornwall for leave to sue the defendant; with respect to the papers and order on said application; with respect to the opposition of Pierre B. Cornwall to the discharge of the defendant in bankruptcy and the papers thereon; with respect to the defendant's proceedings to set aside the opposition of Pierre B. 333
Cornwall to the defendant's discharge in bankruptcy and the papers thereon; with respect to what was said on the motion before Judge Hoffman to set aside the opposition of Pierre B. Cornwall to the defendant's discharge in bankruptcy; with respect to the acquiesence of Pierre B. Cornwall in Judge Hoffman's order thereon, and why no appeal was taken therefrom; with respect to the proceedings taken on the California judgment; with respect to consultations between the said Pierre B. Cornwall and his counsel, and with respect to foreign suits upon the said California judgment against the de-

334 fendant, and the Court erred in holding that said answers were evidence for any purpose against the defendant upon the issues herein.

X.

The Court erred in admitting in evidence "Plaintiff's Exhibit Leave," and in holding that said exhibit was evidence for any purpose against the defendant upon the issues herein.

XI.

The Court erred in admitting in evidence "Plaintiff's Exhibit Opposition," and in holding that the said exhibit was evidence for any purpose against
335 the defendant upon the issues herein.

XII.

The Court erred in admitting in evidence "Plaintiff's Exhibit Petition to Dismiss," and in holding that said exhibit was any evidence whatsoever against the defendant for any purpose upon the issues herein.

XIII.

The Court erred in admitting in evidence the order of Judge Hoffman, granting the motion to dismiss the opposition of Pierre B. Cornwall, and in holding that said order was evidence for any purpose against
336 the defendant upon the issues herein.

XIV.

The Court erred in admitting in evidence the deposition of Joseph Naphtaly, and in holding that said deposition was evidence for any purpose against the defendant upon the issues herein.

XV.

The Court erred in admitting in evidence the answers to the following questions in said deposition put to Joseph Naphtaly, to wit: Questions 7, 8, 9, 10,

11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 337
27, 28, 29, 30, 31, 32 and 33, and cross questions 1, 2, 3 and 4, and redirect-question 9; said answers being in substance with respect to the bankruptcy proceedings of the defendant in California; with respect to the application of Pierre B. Cornwall for leave to sue the defendant; with respect to Pierre B. Cornwall's opposition to the defendant's discharge in bankruptcy and the papers thereon; with respect to the proceedings for setting aside the opposition of Pierre B. Cornwall to the defendant's discharge in bankruptcy and the papers thereon; with respect to what occurred and was said at the argument of the motion to set aside said opposition; with respect to the order thereon and acquiescence of Pierre B. Corn- 338
wall therewith and his satisfaction thereat; with respect to the state of mind and the opinions of said Pierre B. Cornwall and his counsel as to the validity of the judgment in the California court, and the Court erred in holding that said answers were evidence against the defendant for any purpose upon the issues herein.

XVI.

The Court erred in admitting in evidence the deposition of Ogden Hoffman, and in holding that said deposition was evidence against the defendant upon the issues herein.

339

XVII.

The Court erred in admitting in evidence the answers to the following questions in said deposition of said Ogden Hoffman, to wit: Questions 3, 4, 5 and 6, which answers were in substance with respect to the action of the said Ogden Hoffman upon the argument of the motion to dismiss the opposition of said Pierre B. Cornwall; with respect to the proceedings on said motion and the papers thereon, and in holding that said answers were evidence against the defendant for any purpose upon the issues herein.

340 XVIII.

The Court erred in admitting in evidence the deposition of Robert Thompson, and in holding that said deposition was evidence for any purpose against the defendant upon the issues herein.

XIX.

The Court erred in admitting in evidence the answers to the following questions put in the said deposition to the said Robert Thompson, to wit: Questions 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24 and 25, which answers in substance were with respect to the relations between the defendant and the said Robert Thompson; with respect to
341 the bankruptcy proceedings of the defendant in California; with respect to the opposition proceedings of Pierre B. Cornwall to the discharge of the defendant from bankruptcy; with respect to the argument of the defendant's motion to dismiss the opposition of Pierre B. Cornwall to the defendant's discharge in bankruptcy; with respect to what was said upon the argument of said motion, and with respect to matters connected with an appeal from the order thereon; and in holding that said answers were any evidence against the defendant upon the issues therein.

XX.

342 The Court erred in admitting in evidence the injunction granted in this court in favor of the plaintiff against the defendant, and in holding that said injunction was any evidence against the defendant for any purpose upon the issues herein.

XXI.

The Court erred in holding that the defendant was estopped from denying the jurisdiction and validity of the judgment recovered against him in California by Pierre B. Cornwall, and in holding that there was any evidence adduced by the plaintiff sufficient to constitute an estoppel.

XXII. 343

The Court erred in directing a verdict for the plaintiff, and in holding that there was no evidence upon which the defendant could recover.

XXIII.

The Court erred in refusing to direct a verdict in favor of the defendant, and in holding that the defendant was not entitled to judgment.

XXIV.

The Court erred in admitting testimony as to what was said on the argument of the motion before Judge Hoffman to dismiss the opposition of Pierre 344
B. Cornwall to the discharge of the defendant in bankruptcy.

XXV.

The Court erred in not holding that the defendant's discharge in bankruptcy was a bar to the plaintiff's alleged cause of action.

XXVI.

The Court erred in holding that the defendant asserted the validity of the California judgment recovered by Pierre B. Cornwall as the only ground for dismissing his opposition to the defendant's discharge in bankruptcy. 345

XXVII.

The Court erred in holding that the defendant's discharge in bankruptcy did not discharge the judgment upon which the recovery herein is based.

XXVIII.

The Court erred in not holding that, inasmuch as the defendant's motion before Judge Hoffman to dismiss the opposition of Pierre B. Cornwall to his discharge in bankruptcy was based upon several

346 grounds, the Court therefore could not determine that Judge Hoffman, in granting the order dismissing said opposition, acted upon the single ground, to wit, defendant's affirmation of the validity of the judgment in California, which is the basis of this action.

Wherefore, the defendant and plaintiff in error prays that the judgment of the Circuit Court of the United States for the Southern District of New York in favor of the plaintiff and against the defendant be reversed.

Dated New York, January 7, 1893.

LOGAN, CLARK & DEMOND,

347 Attorneys for Defendant and Plaintiff in Error,
58 William street,
New York City.

(Endorsed)—U. S. Circuit Court, So. Dist. of New York.—Pierre B. Cornwall, Plff. and Deft. in Error against Erwin Davis, Deft. and Plff. in Error.—Assignment of Errors.—Logan, Clark & Demond, Attys. for Deft. Davis, 58 William St., N. Y.—U. S. Circuit Court.—Filed Jan. 13, 1893.—John A. Shields, Clerk.

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CIRCUIT COURT OF THE UNITED STATES 349

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Second Circuit.

ERWIN DAVIS,
Plaintiff in Error,

AGAINST

PIERRE B. CORNWALL,
Defendant in Error.

Bond for Damages and Costs.

350

KNOW ALL MEN BY THESE PRESENTS: That we, Erwin Davis, of the City, County and State of New York, as principal, and Emily B. Davis of said City, County and State, and Charles E. Phelps of Bay Shore, Long Island, N. Y., as sureties, are held and firmly bound unto the above named Pierre B. Cornwall in the sum of forty five thousand ($45,000) dollars, to be paid to the said Pierre B. Cornwall, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents. Sealed with our seals and dated the eleventh day of January, in the 351
year of our Lord, one thousand eight hundred and ninety-three.

Whereas, the above named Erwin Davis has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit to reverse the judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such that if the above-named Erwin Davis shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make his

said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ERWIN DAVIS. [L. S.]
EMILY B. DAVIS. [L. S.]
CHARLES E. PHELPS. [L. S.]

City, County and State of New York, ss.:

On this 11th day of January, 1893, before me, a Notary Public in and for the City and County of New York, personally appeared the above-named Erwin Davis and Charles E. Phelps, and on the 12th day of January, 1893, the above-named Emily B. Davis, to me personally known, and known to me to be the individuals who executed the foregoing bond, and severally acknowledged to me that they executed the same for the uses and purposes herein set forth.

[L. S.] F. H. KNIGHT,
Notary Public,
New York County.

City, County and State of New York, ss.:

CHARLES E. PHELPS, being duly sworn, says: I reside at Bayshore, Long Island, in the State of New York, and am a freeholder therein; I am worth the sum of two hundred and ten thousand dollars, over and above all debts and liabilities, and exclusive of property exempt from levy and sale under execution.

CHARLES E. PHELPS.

Sworn to before me this 11th day of January, 1893.
[L. S.] F. H. KNIGHT,
Notary Public,
New York Co.

City, County and State of New York, ss.:

EMILY B. DAVIS, being duly sworn, says: I reside in the City, County and State of New York, and am a freeholder therein, and my place of residence is at

121 Madison avenue, New York City. I am the wife 355
of the within-named Erwin Davis, and am worth the sum of two hundred and ten thousand dollars, over and above all my debts and liabilities, and exclusive of property exempt from levy and sale under an execution. The property above mentioned stands in my own name, and is absolutely my own, and is in no way controlled by my said husband, and I signed this bond willingly and without any fear of or control on the part of my said husband.

EMILY B. DAVIS.

Sworn to before me this 12th }
day of January, 1893. }

[L. S.] F. H. KNIGHT,
Notary Public, 356
New York Co.

(Endorsed).—U. S. Circuit Court, So. Dist. of N. Y. —Erwin Davis, Plff. in Error, against Pierre B. Cornwall, Deft. in Error.—Bond for Damages and Costs.—Logan, Clark & Demond, Attys for Davis, 58 William street, New York. The Within Bond Approved Jan. 12, 1893.—E. Henry Lacombe, U. S. Circuit Court.—Filed Jan. 13, 1893.—John A. Shields, Clerk.

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358 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ERWIN DAVIS,
Defendant and Plaintiff
in Error,

AGAINST

PIERRE B. CORNWALL,
Plaintiff and Defendant
in Error.

359

City and County of New York, ss.:

MARX E. HARBY, being duly sworn, says: That he is of the age of twenty-one years and upwards, and that on the 13th day of January, 1893, at 48 Wall street, in the City of New York, State of New York, he served a copy of the annexed citation on Anson Maltby, attorney for the plaintiff and defendant in error, in this action, by delivering a copy of the same on him personally, leaving the same with him, and exhibiting to him the Judge's signature on the original thereof, and he further says, that he knows
360 the person so served as aforesaid, to be the attorney for Pierre B. Cornwall, the person mentioned and described in said citation.

MARX E. HARBY.

Sworn to before me this 13th day of January, 1893.

F. H. KNIGHT,
Notary Public,
New York.

[SEAL.]

CIRCUIT COURT OF THE UNITED STATES 361

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ERWIN DAVIS,
Defendant and Plaintiff
in Error,

AGAINST

PIERRE B. CORNWALL,
Plaintiff and Defendant
in Error.

UNITED STATES OF AMERICA, SS.: 362

To PIERRE B. CORNWALL, Greeting:

You are hereby cited and admonished to be and appear at a Term of the United States Circuit Court of Appeals, for the Second Circuit, to be holden in the City of New York, on the 10th day of February, 1893, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Erwin Davis is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf. 363

Dated New York, January 12, 1893.

E. HENRY LACOMBE,
Judge.

(Endorsed)—U. S. Circuit Court, So. Dist. of N. Y. —Erwin Davis, Plff. in Error, *against* Pierre B. Cornwall, Deft. in Error.—Original Citation and Proof of Service.—Logan, Clark & Demond, Attys. for Davis, 58 William street, New York. —U. S. Circuit Court.—Filed Jan. 14, 1893.— John A. Shields, Clerk.

U. S. CIRCUIT COURT OF APPEALS, 364

SECOND CIRCUIT.

DAVIS,

Plaintiff in Error,

vs.

CORNWALL,

Defendant in Error.

365

WALLACE, Circuit Judge.

This is a writ of error by the defendant in the Court below to review a judgment for the plaintiff, entered upon the verdict of a jury by the direction of the trial judge. The action was brought upon a judgment recovered by the plaintiff against the defendant December 18, 1892, in the District Court of the Fifteenth Judicial District of the State of California. The defence was that the defendant had duly obtained a discharge from all his debts, including the judgment, by a decree of the United States District Court for the District of California, 366 in a proceeding in bankruptcy.

The ruling of the trial judge in directing a judgment for the plaintiff, proceeded upon the theory that the defendant was estopped from asserting this defence by his conduct in the course of the bankruptcy proceeding. The correctness of this ruling is the principal question presented by the assignments of error.

Whether the defendant was estopped depends upon the following facts: It appeared that after the defendant had been adjudged a bankrupt, the plaintiff, who was then a creditor of the defendants, and had filed a proof of debt, founded upon

367 various promissory notes made by the defendant, obtained leave of the Court in the bankruptcy proceeding to sue and enforce his demands against the defendant in the courts of the State, and commenced a suit which resulted in the judgment upon which the present action was brought. After the judgment had been rendered the defendant applied in the bankruptcy proceeding for a discharge from his debts, and the plaintiff filed specifications in opposition thereto, setting up the existence of various grounds disentitling the defendant to a discharge. Thereupon the defendant applied to the Court in the bankruptcy proceeding for an order dis-
368 missing the specifications of the plaintiff, and canceling the plaintiff's proof of debt. This application was opposed by the plaintiff, but was granted by the Court. The petition on which the application was founded set forth as the only grounds the statement that after the plaintiff had proved his debt and had obtained leave to commence an action in the State Court, he commenced such an action in the Fifteenth Judicial District Court of the State of California, and recovered a judgment against the bankrupt, the defendant therein, and that said judgment still stood of record in the said Court, and was in full force. The plaintiff did not attempt
369 to review the order by a petition of appeal, or otherwise, but acquiesced in the decision.

Inasmuch as the sole basis for the order of the Court in the bankruptcy proceeding was the averment in the petition of the bankrupt that the plaintiff had recovered the present judgment, and that said judgment was in full force, it would seem obvious that the decision embodied in the order canceling the proof of debt and dismissing the specifications must have proceeded upon the ground that the plaintiff, because of his judgment, had no rights or interests to protect in the bankruptcy court. This conclusion could only have been reached upon the view that the plaintiff's judgment could not be affected by a discharge of the defendant in bank-

ruptcy. Manifestly it was the purpose of the petition to induce this view, and the object was accomplished by it. 370

The ruling of the trial judge thus presents the question whether the defendant, after having obtained a decision in the bankruptcy proceeding, precluding the plaintiff from contesting his right to a discharge upon the ground that the discharge could not affect the judgment, can be permitted, when sued upon the judgment, to deny what he then asserted and impeach as erroneous the order which he procured the Court to make, to the prejudice of the plaintiff while retaining its benefit himself. We think this question is settled adversely to 371
the defendant by the recent decision of the Supreme Court in Davis *v.* Wakelee (Sup. Court Rep., Vol. 15, 555). That was a suit in equity brought in the United States Circuit Court for the Southern District of New York by the assignee of Henry P. Wakelee, alleging that she was about to commence an action at law in that court to enforce a judgment recovered by her assignor against the defendant in a California court, and praying for a decree in aid of such action, adjudging the defendant to be estopped from asserting a defence that the judgment was void for want of jurisdiction of the person of the defendant by the court in which it 372
was rendered, and from setting up his discharge in bankruptcy as a defence. The estoppel claimed was predicated of facts precisely similar to those in the present case, viz., the recovery of the judgment by Wakelee after defendant had been adjudicated a bankrupt, and after leave to sue had been granted in the bankruptcy proceeding; the application of the bankrupt for his discharge, and opposition thereto by Wakelee; the application by the defendant in the bankruptcy proceeding for an order cancelling Wakelee's proof of debt, and dismissing his specifications opposing the discharge; and the granting of the order and the acquiescence of Wakelee therein. The petition upon which the order was

373 obtained was identical with that in the present case, except as to the name of the creditor and the date and amount of the judgment. The Circuit Court sustained the bill, and made a decree restraining the defendant from asserting the invalidity of the judgment. That court, however, declined to decide whether the defendant was estopped from pleading his discharge, holding that the complainant could avail herself of any such estoppel in an action at law, and did not need the assistance of a court of equity. Upon an appeal by defendant from this decree, the Supreme Court was of the opinion that the defendant was estopped from claim-
374 ing that the judgment of the California court was void for want of jurisdiction, and affirmed the decree of the Circuit Court. That court, after considering the question whether the complainant could resort to equity or could get the benefit of the estoppel in the action at law, and expressing the opinion that the remedy at law was not so plain or clear as to oust a court of equity of jurisdiction, proceeded to discuss the case upon the merits, and used the following language: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding; and succeeds in maintaining that position, he
375 may not, thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." * * * "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it." This decision is controlling,

and renders any discussion of the question now be- 376
fore us superfluous. The appellant attempts to parry the force of the decision by urging that the case then before the Court differed from the present case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding that the judgment was in full force. The Court, however, did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but put its conclusions upon the salutary doctrine of estoppel which prohibits parties from playing fast and loose with courts of justice. Indeed, all the statements in the petition which was the 377
basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the Court was of the opinion that, although the defendant in making them was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and by conclusive presumption could not have been misled by the defendant's statement, that the judgment was in full force, when, in fact, it was a nullity because of want of jurisdiction of the Court which rendered it. He was prejudiced, not by any false statement of the defendant, but by the conduct of
the defendant in procuring a disposition of his legal 378
rights by a judicial tribunal to his disadvantage and for the benefit of the defendant; and if he chose to acquiesce, the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong.

The assignments of error impugn the rulings of the trial judge in admitting in evidence the arguments made by counsel in the bankruptcy proceeding upon the application for the order cancelling the plaintiff's proof of debt, and dismissing the specifications. It may be that the statements made on that occasion by the counsel for the defendant ought

379 not to be imputed to and used as the representations of the defendant to the Court. However this may be, the arguments were admissible for the purpose of showing what question was before the Court; and in any event the admission of the evidence was innocuous, because, as we have shown, it was obvious from the petition itself that the order proceeded upon the grounds that the plaintiff's judgment could not be affected by a discharge of the defendant in bankruptcy, and the trial judge would have been justified in so ruling without looking further.

We conclude that there was no error in the rul-
380 ings of the trial judge, and that the judgment should be affirmed.

(Endorsed): U. S. Cir. Ct. of Appeals, Second Cir.—Davis, Plff., in Error, *v.* Cornwall, Deft., in Error.—Opinion, Wallace, Cir. Judge.—United States Circuit Court of Appeals, Second Circuit. —Filed May 28, 1895.—JamesC. Reed, Clerk.

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U. S. CIRCUIT COURT OF APPEALS, 382

FOR THE SECOND CIRCUIT.

Term 1895.

ERWIN DAVIS,

Plaintiff in Error,

against

PIERRE B. CORNWALL,

Defendant in Error. 383

Please take notice, that, at his Chambers, at the Post Office Building, in the City of New York, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, on the 3d day of June, 1895, a motion will be made on the part of the defendant in error, before the Hon. E. Henry Lacombe, Circuit Judge, that the annexed order be entered herein, and for such other, further and different order or relief as to the Court may seem just. 384

Dated New York, May 29th, 1895.

ANSON MALTBY,
Attorney for Defendant in Error,
48 Wall St., N. Y.

To

Messrs. LOGAN, CLARK & DEMOND,
Attorneys for Plaintiff in Error,
58 William Street, N. Y.

385 U. S. CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Term 1895.

ERWIN DAVIS,

Plaintiff in Error,

against

PIERRE B. CORNWALL,

386 *Defendant in Error.*

Error to the Circuit Court of the United States for the Southern District of New York.

This case came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here

Ordered and adjudged, that the judgment of the said Circuit Court be, and the same is, hereby 387 affirmed, and that the mandate of this Court issue to the said Circuit Court for the Southern District of New York, directing entry of judgment of affirmance accordingly.

Dated New York, June 5, 1895.

W. J. W.,
E. H. L.

Endorsed: United States Circuit Court of Appeals, for the Second Circuit—Erwin Davis, plaintiff in error, against Pierre B. Cornwall, defendant in error—Order and Notice of Motion—Anson Maltby, attorney for defendant in error, 48 Wall Street, New York City—Service of a copy

of within order and notice is hereby admitted 388
—New York, May 29th, 1895—Logan, Clark &
Demond, attorneys for plaintiff in error—
United States Circuit Court of Appeals, Second
Circuit—Filed June 6th, 1895—James C. Reed,
Clerk.

UNITED STATES OF AMERICA, ss.:

The President of the United States of America,

To the Honorable the Judges of the Circuit Court
of the United States for the Southern District
of New York. 389

[SEAL.]

GREETING:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between Pierre B. Cornwall, plaintiff, and Erwin Davis, defendant, wherein the judgment of the said Court is in words and figures following, viz.:

"This action having come on to be tried in its regular order on the calendar, before the Honorable Nathaniel Shipman, judge and a jury, at a stated term of the Circuit Court of the United States of 390
America for the Southern District of New York, in the Second Circuit, at the United States Circuit Court room, in the City of New York, on the 20th day of October, 1892; and the counsel for the plaintiff having moved that a verdict be directed in favor of the plaintiff upon the pleadings herein and upon the evidence produced upon the trial; and the jury having found a verdict for the plaintiff and against the defendant, under direction of the Court, in the sum of thirty-eight thousand five hundred and thirty-three dollars and twenty-nine cents ($38,533.29), and the costs of the plaintiff having been duly taxed, on notice, at the sum of fifty-seven and 23/100 ($57.23) dollars;

UNITED STATES OF AMERICA, :
Southern District of New York, : ss:

I, JAMES C. REED, Clerk of the United States Circuit Court of Appeals for the Second Circuit, DO HEREBY CERTIFY, that the foregoing pages, numbered from 1 to 129 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Erwin Davis, Plaintiff in Error, vs. Pierre B. Cornwall, Defendant in Error, as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second (Seal.) Circuit, this 9th day of October in the year of our Lord one thousand eight hundred and ninety-five and of the Independence of the said United States, the One Hundred and Twentieth.

James C. Reed,
Clerk.

391 Now, on motion of Anson Maltby, Esquire, attorney for the plaintiff, it is adjudged that said plaintiff, Pierre B. Cornwall, have judgment upon the merits against the defendant, Erwin Davis, in the sum of thirty-nine thousand and twenty one and 37/100 ($39,021.37) dollars, being the amount of said verdict and interest thereon to this day, and that said plaintiff recover of Erwin Davis, the defendant, the sum above named, together with the sum of fifty-seven and 23/100 ($57.23) dollars, costs as adjusted, amounting together to the sum of thirty-nine thousand and seventy-eight and 60/100 ($39,078.60) dollars, and that he have execution
392 therefor.

Judgment signed this 5th day of January, 1893.

JOHN A. SHIELDS,
Clerk."

as by the inspection of the transcript of the record of the said court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in
393 the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now by the Court,

Ordered and adjudged that the judgment of the said Circuit Court be, and the same is, hereby affirmed, with costs taxed at the sum of thirty-one dollars and seventy-five cents ($31.75).

June 6, 1895.

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United

States ought to be had, the said writ of error notwithstanding. 394

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES C. REID,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

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Costs of defendant in error:

Clerk.....	$11.75
Attorney...	20.00
	$31.75

Endorsed:
United States Circuit Court of Appeals
For the Second Circuit.
No. 21, October Term, 1894.

Erwin Davis
against
Pierre B. Cornwall. 396

Mandate.

United States Circuit Court,
Filed June 8, 1895.

JOHN A. SHIELDS,
Clerk.

UNITED STATES OF AMERICA, :
: ss:
Southern District of New York, :

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States, in and for the Second Circuit and Southern District of New York,

DO HEREBY CERTIFY, that I have compared the preceding with the original Mandate in the cause between Pierre B. Cornwall plaintiff and Erwin Davis defendant on file and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the City of New York, (Seal.) in the District and Circuit above-named, this 9th day of October in the year of our Lord one thousand eight hundred and ninety-five and of our Independence the one hundred and twentieth.

John A. Shields, Clerk.